Supreme Court, U.S.
FILED
99 353 AUG 26 1999
OFFICE OF THE CLERK

No. 99-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

ANDREW K. KIM,

Petitioner,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, for its division, the University of Alabama School of Medicine, HAROLD J. FALLON, M.D., and KATHLEEN G. NELSON, M.D.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment requires procedural protections beyond an "informal give-and-take" when a student is expelled from a state school for non-academic reasons?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Andrew K. Kim respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The district court's opinion dismissing petitioner's complaint, App. B1-B18, is unpublished. The Eleventh Circuit's opinion affirming, App. A1-A5, is unpublished. The Eleventh Circuit's order denying rehearing and rehearing *en banc*, App. C1-C2, is unpublished.

JURISDICTION

The Eleventh Circuit entered its judgment on December 29, 1998, and denied rehearing and rehearing *en banc* on May 28, 1999. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case presents a question involving the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law ...." U.S. Const., Amed. XIV, § 1.

STATEMENT OF THE CASE

Petitioner Andrew K. Kim is a former medical student at respondent the University of Alabama School of Medicine ("UASOM"). Medical students at UASOM are generally required to pass Part One of the United States Medical Licensing Examination ("USMLE") before advancing to their third year of medical school. Students must pass the exam by their third try. App. B2-B3.[1]

Over a period of four years beginning in 1992, Kim was beset by a series of personal disasters that dramatically interfered with his medical studies. These included the death of his brother, Kim's resulting depression, the suicide of his sister-in-law, and harassment by a former girlfriend that ultimately required police involvement. Because of these events, Kim had sought and was granted two leaves of absence during this time period. He also requested, and was granted, the

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[1] The facts are taken from the opinions below, unless otherwise noted by citation to the record.

opportunity to repeat his second year, which he did by retaking one class and auditing several others. App. B2-B4.

By June 1996, Kim had finished repeating his second year of medical school and was scheduled to sit for part one of the USMLE that month. Because of the various upheavals and leaves of absence, Kim had missed several sittings for the USMLE after he had previously completed his second-year studies. Kim had ultimately been excused from each of those prior exams, and hence none of them counted as a failure against his three chances to pass. [R1-19, pp. 51-57, Nelson Deposition.] The June 1996 sitting was the first opportunity for Kim to take the exam after repeating his second year. App. B3-B4.

Because the harassment during his repeat second year had interfered with his studies, Kim was unprepared for the June 1996 exam and withdrew from the sitting. He notified the National Board of his withdrawal from the exam, but, due to his embarrassment, failed to notify the University. When UASOM learned that Kim had not taken the exam, Respondent Dr. Kathleen G. Nelson, Associate Dean of Students, sent Kim a letter terminating him as a medical student. App. B4.

After receiving this letter, Kim requested reinstatement or an opportunity to appeal Dr. Nelson's decision. Nelson initially denied this request and refused to allow Kim to obtain a copy of his medical school records. Kim then followed the dismissal procedures set out in the student handbook and filed a formal notice of appeal requesting a hearing before the Associate Dean for Undergraduate Medical Education. App. B4-B5.

UASOM denied Kim's request for a hearing according to the handbook. UASOM also failed to provide Kim its *de facto* appeals procedure for academic dismissals whereby a three-person panel hears a student's initial appeal. Respondent Nelson explained that the *de facto* procedure for aca-

demic dismissals was not used because Kim's expulsion was "administrative" rather than "academic." App. B5, B10-B11 (quoting Nelson deposition). Rather than use the applicable written procedures or the inapplicable academic procedures, the University had Kim meet with Nelson, and later with respondent Dr. Harold J. Fallon, Dean of the Medical School. Both Nelson and Dean Fallon denied Kim's request for reinstatement. App. B5.

Kim brought suit in the United States District Court for the Northern District of Alabama alleging, *inter alia*, a violation of his procedural due process rights based upon the lack of an adequate hearing and the failure of the University to apply its own written or *de facto* appeal procedures. Jurisdiction in the district court was based upon 28 U.S.C. § 1331, conferring federal question jurisdiction for Kim's constitutional claims as well as for several statutory claims no longer at issue on appeal.

The district court granted summary judgment for defendants, holding with respect to the procedural due process claim that Kim received sufficient process under the Fourteenth Amendment. Relying upon *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U. S. 78, 85-86 (1981), the court mistakenly held that due process in this case required only an "informal give-and-take" rather than a more formal hearing. App. B12.

The district court recognized that there is a "'significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct.'" App. B12 (quoting *Horowitz*, 435 U. S. at 86). While acknowledging that such difference requires greater procedural protections in "disciplinary" dismissals than in "academic" dismissals, the court erroneously concluded that academic dismissals therefore required even less than *Horowitz*'s "informal give-and-take" rather than that disciplinary dismissals required more than such informality. App. B12-B13 (citing *Haberle* v. *University of Alabama in Birmingham*, 803

F. 2d 1536, 1539 (CA11 1986)). The Court thereafter held that under either the *Horowitz* standard of an informal "opportunity to be heard" or some lesser standard for an academic dismissal, UASOM had provided Kim with sufficient process. App. B13. After dealing with several other claims not at issue in this petition, the district court granted defendants summary judgment on all claims.

Kim appealed to the Eleventh Circuit, seeking reversal of the district court's disposition of his procedural and substantive due process claims. Jurisdiction in the Eleventh Circuit was based upon 28 U.S.C. § 1291.

The Eleventh Circuit rejected Kim's appeal and affirmed the district court in an unpublished opinion. The court held that Kim's meetings with respondents Dr. Nelson and Dean Fallon afforded him constitutionally sufficient due process. App. A3-A4. After citing to *Haberle* and *Horowitz*, the Eleventh Circuit approved the district court's supposed acceptance of the University's explanation that its departures from University procedures "were warranted because Kim's dismissal was a hybrid case (involving aspects of both academic and disciplinary dismissal) and did not fit" the situation covered by the university's written rules or prior practices. App. A4. (In fact, the district court made no finding that the dismissal had academic aspects, and expressly noted that the dismissal was *not* on academic grounds. App. B11, B13.) The Court then concluded that "regardless of any slight variations [from UASOM procedures], Kim received the notice and informal discussion to which he was entitled." App. A4.

Kim petitioned the Eleventh Circuit for rehearing and rehearing *en banc*, both of which were denied. App. C1-C2.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Eleventh Circuit's holding that a student subject to a disciplinary dismissal

is entitled only to the informal process acceptable for academic dismissals is inconsistent with the due process standard for disciplinary dismissals in the First, Sixth, and Eighth Circuits.

The procedural standard applied by the Eleventh Circuit is also inconsistent with this Court's opinions in *Horowitz* and *Goss* v. *Lopez*, 419 U. S. 565 (1975), where this Court stated that disciplinary dismissals and dismissals accompanied by some future burden on the student require more formal procedural protections than either academic dismissals or less severe forms of discipline.

I. The Procedural Protections Required by the Eleventh Circuit for a Disciplinary Dismissal are Inferior to, and Inconsistent with, the Protections Required by the First, Sixth, and Eighth Circuits.

As the district court recognized, Kim was not dismissed for academic reasons. Rather, he was dismissed for a supposed violation of the administrative requirement that he take the USMLE in June of 1996. Respondent Nelson effectively admitted that the dismissal was a punishment for his behavior rather than the consequence of poor academic performance when she testified that she found his failure to take the exam "totally irresponsible." [R1-19, p. 64, Nelson Dep.] Indeed, had Kim sat for and failed the exam, he would not have been dismissed, but would have been allowed to enroll in his third year and had *two more chances* to pass. [R1-19, pp. 62-63, Nelson Dep.] He was thus dismissed not for failing to *pass* the exam, but rather for failing to sit for it in June 1996.

Regardless of whether one characterizes Kim's dismissal as administrative, disciplinary, or hybrid, what it is not is "academic." [2] Kim thus is entitled to greater procedural pro-

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[2] In *Mauriello* v. *University of Medicine and Dentistry of New Jersey*, 781 F. 2d 46, 50 (CA3), *cert. denied*, 479 U. S. 818 (1986), the Third Circuit distinguished its academic case from a disciplinary dismissal, the latter

tections than in the academic dismissal at issue in *Horowitz*. The greater protections sought by Kim were an initial appeal to a neutral party – as per UASOM's rules – and the ability to know and respond to the arguments and charges raised against him by Nelson. App. B5, B10-B11. The Eleventh Circuit in this case, however, held that Kim was entitled only to the "informal give-and-take" discussed in *Horowitz* for an academic dismissal and in *Goss* for a minor disciplinary suspension of ten days or less. App. A3.

Several Circuits have recognized that non-academic dismissals require greater procedural safeguards than academic dismissals. For example, in *Woodis* v. *Westark Community College*, 160 F. 3d 435, 440 (CA8 1998), the Eight Circuit held that a college student facing disciplinary expulsion was entitled to due process "by way of adequate notice, definite charge, and a hearing with opportunity to present one's own side of the case and *with all necessary protective measures*" (citation and quotation marks omitted; emphasis added). In finding that the expulsion in that case satisfied due process, the Eighth Circuit noted the numerous procedural protections provided the student, including an appeal to "an independent disciplinary appeals committee" and a second disciplinary hearing wherein she "had an opportunity to consult with counsel, examine evidence introduced against her and participate" in the hearing. *Id.*[3]

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defined by the district court as "'a case of her being compelled by rule, order, or law of the school to do something and not having done it getting discharged.'" Kim's case falls squarely within this disciplinary definition. He was not dismissed for failing to pass the test – an issue of academic performance – but rather for failing to sit for it – an issue of supposed violation of a rule or order.

[3] Even if this were viewed as a hybrid case, it would still be in tension with *Greenhill* v. *Bailey*, 519 F. 2d 5 (CA8 1975), wherein the Eighth Circuit recognized the general rule that academic dismissals are entitled to less procedural protections than disciplinary dismissals, but distinguished the dismissal in its case by noting the added element of disparagement of the student's intellectual ability, hindering the student's future educational

In *Hall* v. *Medical College of Ohio at Toledo*, 742 F. 2d 299, 308 (CA6 1984), *cert. denied*, 469 U. S. 1113 (1985), the Sixth Circuit reviewed both *Goss* and *Horowitz* and concluded that as far back as 1978, "some kind of *formal hearing* was apparently required before a student could be expelled for disciplinary causes" (emphasis added). Although affirming the district court's ruling on qualified immunity because the claimed right to have counsel present had not been clearly established, the Sixth Circuit observed that the student had received the "opportunity to testify on his own behalf, to present his own witnesses, and to cross-examine those witnesses presented" against him. 742 F. 2d at 309-10. He also received written copies of the various decisions against him, a transcript of the hearing was available, and he was able to raise all of his objections to the proceedings and evidence when meeting with the college president. *Id.* at 310. The Sixth Circuit concluded that "[a]side from the question of counsel, it is hard to see what further procedural safeguards could have been provided without turning this hearing process into an exact equivalent of a courtroom trial," something no court had yet done. *Id.*

The First Circuit in *Gorman* v. *University of Rhode Island*, 837 F. 2d 7, 13-14 (CA1 1988) quoted from a seminal Fifth Circuit case holding in the disciplinary context that due process "'requires something more than an informal interview with an administrative authority of the college'" (quoting *Dixon* v. *Alabama State Bd. of Educ.*, 294 F. 2d 150, 158

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opportunities. This added factor removed the case from the typical "academic" category and called for greater procedural protections. 519 F. 2d at 8-9. (The Supreme Court in *Horowitz* recounted this very aspect of *Greenhill* in explaining how the case was consistent with the academic/disciplinary dichotomy it was relying upon. 435 U. S. at 88 n. 5.) In Kim's case, even if the Court accepted the Eleventh Circuit's "hybrid" characterization, there are two added elements that tip the scales toward greater protection: the at least partial disciplinary nature of the decision, and the taint that will follow Kim through his medical school records and hinder him should he try to pursue his medical education elsewhere.

(CA5), *cert. denied*, 368 U. S. 930 (1961)). The student in *Gorman* was found to have received adequate process because he had several extensive hearings with numerous procedural protections. 837 F. 2d at 16. The procedural protections actually given to the student in *Gorman* – as well as to those in *Woodis* and *Hall* – substantially exceeded what was given to Kim, and are consistent with what Kim sought from UASOM.

On the other hand, a recent Fifth Circuit case seems to have the same view as the Eleventh Circuit in this case, holding that even in the context of disciplinary decisions, "the additional procedures required under federal law amount to nothing more than an informal hearing, that is, 'an "informal give-and-take" between the student and the administrative body dismissing him ....'" *Wheeler* v. *Miller*, 168 F. 3d 241, 248-49 (CA5 1999) (quoting *Horowitz* in turn quoting *Goss*).

This confusion among the circuits over the degree of procedural protection required for disciplinary dismissals, and over the interpretation of *Horowitz* and *Goss* in the disciplinary context, is an important issue affecting many students at public schools and universities. This Court should take this opportunity to resolve the confusion and clarify the requirements of the Due Process Clause.

II. The Limited Procedural Protections Required by the Eleventh Circuit for a Disciplinary Dismissal Are Insufficient and in Conflict with Decisions of this Court.

In *Goss* v. *Lopez*, this Court held that a student suspended from school on disciplinary grounds for a period of ten days or less was entitled to "at least an informal give-and-take" with the relevant school authority prior to suspension. 419 U. S. at 584. The Court took special pains to "make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expul-

sions for the remainder of the school term, or permanently, may require more formal procedures." *Id.*

In *Horowitz*, this Court held that a student dismissed for "failure to meet academic standards" was entitled only to an "'informal give-and-take' between the student and the administrative body dismissing him." 435 U. S. at 79, 86 (quoting *Goss*, 419 U. S. at 584). This Court recognized that the greater severity of expulsion as compared to brief suspension weighed in favor of greater protections than in *Goss*, but it also noted that the academic basis for the dismissal weighed in the other direction, thus bringing the process due back to the level described in *Goss*. 435 U. S. at 86 n. 3, 87. The Court noted, however, that

> there are distinct differences between decisions to suspend or dismiss a student for disciplinary purposes and similar actions taken for academic reasons which may call for hearings in connection with the former but not the latter.

Id. at 87.

The procedures approved by the Eleventh Circuit in this case are inadequate under the Due Process Clause and conflict with this Court's precedent in *Goss* and *Horowitz*. Kim's dismissal from medical school involves the worst elements of both *Goss* and *Horowitz* without the mitigating factors present in either case. As in *Goss*, Kim was expelled for disciplinary reasons rather than academic reasons. And as in *Horowitz*, the deprivation was severe – expulsion from school. Neither the temporary nature of the deprivation in *Goss* nor the academic nature of the decision in *Horowitz* is present in this case, and thus there is nothing to diminish the appropriate process down to the mere "informal give-and-take" of those two cases. Rather, Kim was entitled to a more formal hearing with additional safeguards to protect his interests. At a minimum, he was entitled to those safeguards the University actu-

ally provided to students dismissed for academic reasons and who were thus entitled to less process than Kim.

The decision to dismiss Kim was made in the first instance by Nelson, with the Promotions Committee simply ratifying that decision without input from Kim. He was not accorded the opportunity to appeal to the neutral Associate Dean for Undergraduate Medical Education, as provided in the Student Handbook. Rather, after considerable resistance to any process whatsoever, the University had Kim appeal to Nelson, who was already in the functional role of prosecutor. Not surprisingly, Nelson agreed with what she had recommended to the Promotions Committee. Kim's final meeting with Dean Fallon thus took place without benefit of a neutral faculty member having considered Kim's side of the story or re-evaluated Nelson's initial decision. And that final meeting with Dean Fallon was no more than an informal give-and-take – without knowledge of, or opportunity to rebut, any information provided by Nelson, App. B5 – described in *Goss* and *Horowitz* as appropriate only for short suspensions or for academic dismissals.

Given that this was a disciplinary dismissal or (in the Eleventh Circuit's inaccurate description) at best a hybrid matter, Kim was entitled to more formal procedures than he received.[4] At a minimum Kim should have received an initial appeal to a neutral decisionmaker – as provided in the student handbook – and not to a person who had already decided the matter and played the role of advocate for dismissal before the Promotions Committee. Kim also was entitled to more than just an informal give-and-take. He should have been

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[4] Indeed, it is ironic that had this actually been an academic dismissal, Kim would have received more process because the school would have applied either its *de facto* or *de jure* appeals procedures. It was only because this was not an academic dismissal that the school departed from its procedures in the first place. Unfortunately it departed in the wrong direction, providing him with less process rather than more.

able to hear and address the arguments made against him by Nelson and been allowed to question Nelson before other decisionmakers regarding her charge that Kim was irresponsible.

These greater procedures are appropriate because of the severity of the deprivation – permanent expulsion from medical school for supposedly irresponsible and improper behavior – as well as the secondary consequences of such an expulsion, including the harm to his reputation and the near impossibility of admission to another medical school with such an expulsion on his record. That severe a deprivation requires more process than a ten-day suspension or dismissal for failure to satisfy academic standards within the peculiar expertise of the educators.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 26, 1999.

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 29 1998
THOMAS K. KAHN
CLERK

No. 98-6248
Non-Argument Calendar

D. C. Docket No. CV-96-AR-2797-S

ANDREW K. KIM,

Plaintiff-Appellant,

versus

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, for its division, The University of Alabama School of Medicine; HAROLD J. FALLON, M.D., et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama

(December 29, 1998)

Before TJOFLAT, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Andrew K. Kim appeals the district court's grant of summary judgment for the Board of Trustees of the University of Alabama (the "University"). The sole issue on appeal is whether the district court properly determined that there was no genuine issue of material fact regarding Kim's 42 U.S.C. § 1983 claim that the University denied him procedural and substantive due process when it dismissed him from enrollment at the University of Alabama School of Medicine ("UASOM").

Kim originally enrolled at UASOM in July 1991. From May 1993 to January 1994, he sought, and was granted, a leave of absence from UASOM due to personal reasons. He returned in January 1994 and finished his second year of medical school, but felt unprepared to take Step One of the United States Medical Licensing Examination ("USMLE Step One"), which is required for medical students to advance to the third year of medical school. He planned to take USMLE Step One in September 1994 instead, but was unable to do so because of depression over certain family problems. Kim then received a second leave of absence from UASOM which was retroactive to June 1994 and continued until June 1995. The associate dean who granted this second leave of absence emphasized that Kim was expected to take the USMLE Step One in June 1995. However, Kim failed to return to Birmingham in June 1995 to take the USMLE Step One. In a letter to UASOM administrators, Kim indicated that he would sit for the test in September 1995. UASOM informed Kim in response that the September 1995 USMLE Step One would be his last chance to take the exam. Kim did not take the September 1995 exam, but instead requested permission to repeat his second year of school. He was granted permission to retake a course and audit other courses. In June 1996, however, due to further personal problems, Kim once again failed to take the USMLE Step One, this time without notifying UASOM officials of his withdrawal from the June 1996

exam. This was the fifth exam that Kim missed, and three years had passed since the normal time for taking the USMLE Step One. UASOM officials then terminated Kim as a medical student, giving him two appeal opportunities in the process.

This Court applies a de novo standard of review to a district court's grant of summary judgment. See, e.g., Scala v. City of Winter Park, 116 F.3d 1396, 1398 (11th Cir. 1997). Summary judgment is appropriate if the record shows no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See, e.g., Eberhardt v. Waters, 901 F.2d 1578, 1580 (11th Cir. 1990). "All evidence and reasonable factual inferences drawn therefrom are reviewed in the light most favorable to the party opposing the [summary judgment] motion." Warren v. Crawford, 927 F.2d 559, 561-62 (11th Cir. 1991).

Under the Fourteenth Amendment Kim was entitled to a certain minimal level of procedural due process before he could be dismissed from medical school. Board of Curators of Univ. of Missouri v. Horowitz, 435 U.S. 78, 82, 98 S. Ct. 948, 951, 55 L.Ed.2d 124 (1978); Haberle v. University of Alabama at Birmingham, 803 F.2d 1536, 1539 (11th Cir. 1986). This procedural due process includes as its basic elements notice and an opportunity to be heard. Horowitz, 435 U.S. at 85-86, 98 S. Ct. at 952-53. However, in certain circumstances a mere "informal give-and-take" may satisfy this requirement. Id.

In the instant case, Kim was given the constitutionally required notice and opportunity to be heard. Kim was allowed to appeal to Dr. Nelson, Associate Dean of Students, and then to Dr. Fallon, Dean of UASOM. He admitted in his deposition that he believed Dr. Fallon had listened to his explanation of the circumstances surrounding his failure to sit for the USMLE Step One. Procedural due process requires nothing more. See Haberle, 803 F.2d at 1539 ("The fact that the procedures used were ad hoc does not violate the Horowitz stan-

dard; no formal hearing is required."). Kim points to minor discrepancies between the appeal procedure outlined in the student manual and the procedure that was actually provided in his case.[1] The district court did not err in crediting the University's explanation that these minor departures were warranted because Kim's dismissal was a hybrid case (involving aspects of both academic and disciplinary dismissal) and did not fit the type of dismissal for which initiation by the promotions committee would be warranted. At any rate, regardless of slight variations, Kim received the notice and informal discussion to which he was entitled, in the form of meetings with Drs. Nelson and Fallon.

Kim argues also that his dismissal from UASOM was so arbitrary as to violate substantive due process rights under Regents of the University of Michigan v. Ewing, 474 U.S. 214, 106 S. Ct. 507, 88 L.Ed.2d 523 (1985). Ewing assumed arguendo a substantive right under the Due Process Clause with respect to academic decisions that are "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." Id. at 225, 106 S. Ct. at 513. Such challenges, however, provide only a "narrow avenue for judicial review," id. at 226, 106 S. Ct. at 514, and the judgment of university decisionmakers will be respected unless it is "beyond the pale of reasoned academic decision-making," id. at 227-28, 106 S. Ct. at 514-15. Kim had failed to sit for the USMLE Step One five times in a row, in clear contravention of UASOM policy. Under these circumstances, the dis-

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[1] The UASOM handbook stated that a student who suffers adverse action by a three-member promotions committee may appeal the committee's action by filing a timely notice of his intent to appeal. The appeal is heard first by the Associate Dean for Undergraduate Medical Education, and then by the Dean. In the instant case, the initial decision to dismiss Kim was made not by the promotions committee but by Dr. Nelson, Associate Dean of Students, who then presented her decision to the promotions committee and had it ratified by them.

trict court properly concluded that the University was entitled to summary judgment on the assumed substantive due process claim as well as on the procedural due process claim. Cf. Haberle, 803 F.2d at 1539-41 (holding that when a university dismissed a Ph.D student for failing to take a prerequisite qualifying exam, there "was not such a substantial departure from academic norms as to amount to an arbitrary deprivation of property").

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ANDREW W. KIM, Plaintiff vs. THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, for its division, the UNIVERSITY OF ALABAMA SCHOOL OF MEDICINE, HAROLD J. FALLON, M.D., and KATHLEEN G. NELSON, M.D., Defendants	CIVIL ACTION NO. CV-96-AR-2797-S FILED 98 MAR 12 PM 3:39 U.S. DISTRICT COURT N.D. OF ALABAMA

MEMORANDUM OPINION

Presently before the court is a motion for summary judgment made by the defendants, The Board of Trustees of the University of Alabama for its division, the University of Alabama School of Medicine ("UASOM" or "UAB"), Harold J. Fallon, M.D. ("Fallon"), and Kathleen G. Nelson, M.D. ("Nelson"). Plaintiff Andrew W. Kim ("Kim") sues the defendants alleging that they expelled him from the medical school in violation of his Fourteenth Amendment right to due process, and his right to be free from both racial discrimination, 42 U.S.C. §§ 1981, 1983, and disability discrimination, 42 U.S.C. § 12101. Because there is no dispute as to any genuine issues of material fact, summary judgment for defendants is appropriate.

I. FACTS[1]

Andrew Kim is a Korean born naturalized citizen who attended the University of Alabama Medical School. Kim enrolled in July 1991 and performed satisfactorily. By the spring of 1992, however, Kim sought counseling for depression which had been precipitated by his brother's death. On May 18, 1993, Kim requested, and was granted, a leave of absence from UAB. The leave of absence was effective from April 16, 1993 through January 1994. While on leave, the wife of the deceased brother committed suicide, but Kim returned to UAB in January 1994 and finished his second year.

In order to advance to the third year of medical school at UAB, and most American medical schools, a medical student must pass Part One of the United States Medical Licensing Examination ("USMLE"). This examination is offered yearly, in June and in September.

After returning from his leave of absence, in January 1994, and completing his second year, Kim felt unprepared for the June 1994 USMLE. Def.'s Ex. 13 ("I did not take the USMLE, Step 1. Perhaps I did not give it my best effort or studied at too slow pace [sic]. On the day before the exam I still felt that I would not be successful on the first attempt. I apologize for my action and hope that I did not violate school rules."). Therefore he notified the appropriate medical school official and indicated that he would try to take the September 1994 examination. Because of his depression, however, he was unable to take the September 1994 examination.

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[1] The facts are presented in the light most favorable to the plaintiff. *Swint v. City of Wadley*, 51 F.3d 988, 995 (11th Cir. 1995). The court notes, however, that neither party bothered to support its summary of facts with citations to the record.

In early October, Associate Dean C.W. Scott, Jr. ("Scott"), informed Kim by letter that his failure to take the two 1994 examinations would be considered a withdrawal from the medical school, unless Kim contacted Scott by a specified date with an acceptable explanation. Def.'s Ex. 2. Kim met with Scott in a timely manner and explained his family problems. Scott granted Kim a second leave of absence which was retroactive to June 1994 and continued until June 1995. Def.'s Ex. 3. Scott emphasized, however, that Kim was expected to take the June 1995 USMLE. *Id.*

On May 30, 1995, Kim sent a letter to UAB indicating that he would not be able to return to Birmingham in sufficient time to study for the June examination, but that he would sit for the test in September. Def.'s Ex. 4. The letter did not arrive until June 16, 1995. At this point, Kim had failed to sit for the USMLE on three occasions since returning from his second [sic] leave of absence: June 1994, September 1994, and June 1995. The UASCM student handbook provides that a second year student has three opportunities to pass the examination. Def.'s Ex. 1, at p. 64. When Kim returned to campus after missing the June 1995 examination, he met with defendant, Kathleen G. Nelson ("Nelson"), who was the new Associate Dean, replacing Dr. Scott. Nelson insisted that Kim register for the September USMLE. Nelson also sent Kim a letter indicating that the September 1995 s[i]tting would be his last opportunity to take the exam. Def.'s Ex. 5. Kim insists, however, that he did not receive this letter.

Although Kim registered for the examination, he did not take the September USMLE. Instead he requested permission to repeat his second year of school. Kim believed this would more adequately prepare him for the June 1996 examination. Nelson granted his request and allowed Kim to re-take a course and audit several additional courses.

During the academic year, however, he became romantically involved with a woman who threatened him after the relationship ended. The woman and her mother carried

through with these threats by fabricating a story and sharing it with medical school personnel. The women claimed that Kim had kidnapped the former girlfriend and committed other sordid acts. As a result of these allegations Nelson met with Kim and advised him to stay [a]way from the women. Kim then filed charges against the women with the Birmingham police department. He shared a copy of this report with Nelson who subsequently shared the report with defendant, Dr. Fallon, and an instructor in the undergraduate department where the former girlfriend was enrolled. The undergraduate instructor discussed the report with the former girlfriend and the threats from the woman increased. Eventually, Kim complained to UAS police about the women and the harassment stopped.

As a result of these events, Kim was unprepared for the June 1996 USMLE. "Knowing that the student catalogue provided three chances to take the USMLE examinations, he contacted the National Board on June 8, 1996, that he was withdrawing from the June exam." Pl.'s Br. at p. 4. Because he was embarrassed, Kim did not inform Nelson of his failure to sit for the examination. Nine days after he notified the National Board, Nelson sent a letter to Kim terminating him as a medical student for failing to take the USMLE. Def.'s Ex. 7. This was the fifth examination that Kim missed.

Kim immediately requested reinstatement and/or an opportunity to appeal Nelson's decision. Nelson initially denied Kim's request and refused to allow Kim to obtain a copy of his medical school records. Nelson also suggested, on more than one occasion, that Kim attempt to transfer to a medical school in Korea or one of the historically African-American medical schools, such as Meharry or Morehouse. Kim testified that Nelson often used the phrase, "the three M's, Meharry, Morehouse, and minority." Kim Dep., at 115. Kim also alleges that Nelson described him as too polite and too passive. *Id.* at 115. Finally Nelson stated that Kim would not

make a good medical doctor and that he needed further psychiatric help to overcome his depression. *Id.* at 117.

Following the academic dismissal appeal procedures found in the student handbook, Kim filed a formal notice of appeal in which he requested a hearing before the Associate Dean for Undergraduate Medical Education, Dr. Boulware. UAB denied Kim's request, but did permit Kim to meet first with Dr. Nelson and later with Dean Fallon. In his brief, filed in opposition to UASOM's motion for summary judgment, Kim contends that Fallon did not allow Kim to rebut any information Nelson may have provided. In his deposition, however, Kim admitted that he believed Fallon had listened to what Kim had to say about the circumstances surrounding his failure to sit for the USMLE. Kim Dep., at 101. On July 5, 1996, Fallon denied Kim's request for reinstatement. Kim filed the present lawsuit on October 24, 1996.

II. SUMMARY JUDGMENT STANDARD

Under the Federal Rules of Civil Procedure, summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." F.R.Civ.P. 56(c).

III. § 1981 & § 1983 CLAIMS ASSERTED AGAINST STATE ENTITY UASOM

Defendant UASOM first asserts that, pursuant to the Eleventh Amend nent of the Constitution of the United States, it is immune from Kim's § 1981 and § 1983 claims. UASOM's assertion is correct. The Eleventh Circuit has unequivocally held that state entities are immune from both § 1981 and § 1983 suits. *Harden v. Adams,* 760 F.2d 1158, 1163 (11th Cir. 1985) (discussing Section 1983); *Sessions v. Rusk State Hospital,* 648 F.2d 1066, 1068 (5th Cir. 1981) (discussing Section 1981). Similarly there is no doubt that Alabama state universities are entities for purposes of Eleventh Amendment immunity. *Harden*, 760 F.2d at 1163.

Consequently, UASOM is entitled to summary judgment on Kim's § 1981 and § 1983 claims.

If UASOM did not enjoy absolute immunity, it would not be liable for the reasons which follow in analyzing the § 1981 and § 1983 claims against the individual defendants.

IV. § 1981 & § 1983 RACE DISCRIMINATION CLAIMS ASSERTED AGAINST THE INDIVIDUAL DEFENDANTS

Kim argues that the issue of whether his expulsion was motivated by racial animus constitutes "a fact which should be decided by a jury." Pl.'s. Br. at 7. In support of this argument he points to Nelson's comment regarding transfer to a Korean medical school or one of the "three M's, Meharry, Morehouse and minority." Kim Dep., at 115, 117. Kim also claims that Nelson's description of him, as too polite and too passive, was racially derogatory. *Id.* Finally, Kim asserts, via his own affidavit, that discriminatory remarks by Nelson also precipitated the expulsion of another Korean medical student. Kim Aff. (Doc 19), at ¶5. Beyond this, Kim produces no other evidence to support his § 1981 and § 1983 claims.

Kim may make out his prima facie case for disparate treatment: (1) by producing direct evidence of discrimination, (2) by meeting the McDonnell Douglas[] circumstantial evidence framework, or (3) by demonstrating a pattern of discrimination using statistical data.[2] *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990).

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[2] "The Supreme Court has held that the test for intentional discrimination in suits under § 1981 is the same as the formulation used in Title VII discriminatory treatment causes." *Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 949 (11th Cir. 1991), *cert. denied*, 502 U.S. 1058, 112 S. Ct. 935 (1992). The Title VII paradigm also applies to § 1983 cases because "[t]he section 1981 claim has been effectively merged into the section 1983 claim for racial discrimination." *Busby v. City of Orlando*, 931 F.2d 764, 771 (11th Cir. 1991).

A. Direct Evidence

Presumably, Kim contends that Nelson's comments constitute direct evidence and therefore he has made out a prima facie case of racial discrimination. Direct evidence is "evidence, which if believed, proves the existence of the fact in issue without inference or presumption." *Carter v. Three Springs Residential Treatment,* 132 F.3d 635, 641 (11th Cir. 1998) (citations omitted & emphasis supplied). Consistent with this definition, any statements that Kim seeks to introduce as direct evidence must directly relate to Nelson's decision to dismiss him. *See id.* at 642. If Kim cannot show such a connection, between the comments and the dismissal, this court can only consider the comments as indirect evidence. *See Burrell v. Board of Trustees of Georgia Military College,* 125 F.3d 1390, 1393 (11th Cir. 1997).

Nelson's comments do not constitute direct evidence. Although such comments are distasteful, there is no evidence that her decision to dismiss Kim was motivated by racial animus. It is clear that Kim failed to meet the objective requirements for continued enrollment in the medical school program; therefore, this court cannot infer or presume that Nelson was motivated by racial animus when she expelled Kim. "Direct evidence, by definition, is evidence that does not require such an inferential leap between fact and conclusion." *Carter,* 132 F.3d at 642.

Moreover, the record indicates that, until Kim failed to sit for his fifth USMLE, Nelson may have treated Kim more favorably than other students. Kim was aware that he was expected to sit for the June 1995 USMLE after he returned from his second leave of absence in January 1995. When he failed to take both the June and September examinations, Nelson allowed Kim to re-take and/or audit several classes rather than dismiss him from the program. However, Kim then failed to sit for the June 1996. Now he complains that the same dean who allowed him to remain in the program for an additional year, despite his failure to sit for even one exami-

nation, held discriminatory attitudes which affected her decision to dismiss him from the program.

Even it this court were to assume Nelson held racially discriminatory attitudes, she was not the ultimate decision maker. Therefore her statements could not constitute direct evidence. *See LaMontagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1412 (7th Cir. 1984) (cited with approval in *Mauter v. Hardy Corp.*, 825 F.2d 1554, 1558 (11th Cir. 1987)). Dr. Fallon, the Dean of the Medical School, ratified Nelson's decision to dismiss Kim. There is certainly no evidence in the record that would even remotely suggest that Dr. Fallon, the ultimate decision maker, maintained racial animus when he affirmed Nelson's decision. Moreover, Fallon only affirmed Nelson's decision after personally hearing Kim's explanation for his failure to take the USMLE. Because Dean Fallon was the ultimate decision maker with the authority to overrule Nelson's decision, "the relevant inquiry" is into the motivation of Dr. Fallon. *See LaMontagne*, 750 F.2d at 1412. Therefore, any "chain of inference" from Nelson's comments to the decision by Dr. Fallon to uphold the dismissal, "would be sheer speculation." *See id.* Consequently, Nelson's comments do not constitute direct evidence of discrimination.

B. Indirect Evidence

Without direct evidence of discrimination, Kim must proceed, if at all, under the McDonnell Douglas indirect evidence framework by showing that: (1) he was a member of a protected group, (2) he was qualified, (3) he suffered adverse action at the hands of the individual defendants, and (4) he was dismissed "under circumstances that give rise to an inference of discrimination." *See Gitlitz v. Compagnie Nationale Air France*, 129 F.3d 554, 559 (11th Cir. 1997). If Kim can make out a prima facie case under the McDonnell Douglas framework, then the burden of production (not the burden of persuasion) shifts to UASOM to come forward with a legitimate non-discriminatory reason for the dismissal. *See Trotter v.*

Board of Trustees of University of Alabama, 91 F.3d 1449, 1454-55 (11th Cir. 1996). If UASOM can supply such a reason, the burden shifts back to Kim to produce admissible evidence from which a jury might find that UASOM's proffered reason is pretextual. *See id.*

Kim is unable to make out a prima facie case under the McDonnell Douglas[] indirect evidence framework because he cannot show that he was qualified to remain in the program. Continued enrollment, beyond the second year of the program, requires a passing score on the USMLE. The student handbook provides, however, that the student has three opportunities to obtain a passing score. Kim failed to obtain a passing score after five examinations: two 1994 examinations, two 1995 examinations and the June 1996 examination. Even if this court were to overlook his failure to take the two 1994 examinations, because he was granted a retroactive leave of absence for that time period, Kim still was allowed three additional examination opportunities to pass without even sitting for the USMLE. Because he failed to meet the requirements for continued enrollment, he is not "qualified" and cannot make out a prima facie for discrimination. [sic] His personal and emotional problems do not alleviate his duty, pursuant to the McDonnell Douglas[] paradigm, to establish that he was qualified to remain in the program.

Even if Kim could make out a prima fac[i]e case, his race discrimination claims fail because he is unable to produce any evidence from which a jury might find that UASOM's proffered nondiscriminatory reason for the dismissal is pretextual. Kim cannot create pre-text out of thin air by citing his own affidavit regarding the alleged discriminatory treatment of another Asian UASOM student. In the affidavit, Kim affirmed that he spoke with the mother of the other Asian student. Kim Aff. (Doc. 19), at ¶5. Apparently, the mother told Kim that UASOM dismissed her son in his fourth year of medical school and that Nelson had made disparaging re-

marks to the son regarding Asians. *Id.* This double hearsay is inadmissible. Fed. R. Evid. 801.

Even if such evidence were admissible, the mother's conclusory allegation, that UASOM dismissed her son because of his race, is not enough to support a finding of pretext. Consequently, summary judgment is appropriate for the individual defendants on Kim's § 1981 and § 1983 race discrimination claims.

VI. [sic] FOURTEENTH AMENDMENT DUE PROCESS CLAIMS

Kim is unable to complain that UASOM violated his due process rights by refusing to allow him an opportunity to be heard, as required under the Due Process [C]lause of the Fourteenth Amendment to the United States Constitution. He does not dispute that Dr. Nelson, the Associate Dean of Students heard his first appeal. Kim Dep., at 98. Nor does Kim dispute that Dr. Fallon, the Dean of the Medical School, then heard Kim's second appeal. Kim Dep., at 99-101.

Rather than the inability to be heard, Kim complains that UASOM violated his procedural due process rights when it prevented him from utilizing the appeal process available to other students. Specifically, Kim complains that UASOM denied him an opportunity to take advantage of the appeal procedure described in the student handbook as well as the actual appeal procedure UASOM utilizes, but never memorialized.

The student handbook provides that a student who is dismissed from the medical school or suffers adverse action by the promotions committee, may appeal the committee's action by filing a timely notice of his intent to appeal. Student Handbook, Def's. Ex. 1, at p. 63. First and second year students "appeal first to the Associate Dean for Undergraduate Medical Education of the School of Medicine," in this instance Dr. Boulware. *Id.* at p. 64. If the Associate Dean denies the appeal, the student may then appeal to the Dean of

the School of Medicine, Dr. Fallon. *Id.* "The decision of the Dean will be final. No further appeal is offered by the School of Medicine. Academic appeal hearings are not legal proceedings. They constitutes an opportunity for the student to be heard by an academic administrative official of the School of Medicine." *Id.* (emphasis supplied).

However, Dr. Nelson testified that UASOM actually uses an appeal procedure that differs from the one described in the student handbook. A three person panel, not solely Dr. Boulware, hears a student's first appeal in academic dismissal cases. Nelson Dep., at 103-106. However, Nelson did not utilize an appeal panel in Kim's case for two reasons. First, both Nelson and the promotions committee (which certifies each student to progress to the next level of the program) agreed that Kim's expulsion was "administrative," rather than "academic." Nelson Dep., at 113-14. Second, Nelson, not the promotions committee, made the initial decision to dismiss Kim. The appeal panel, according to Nelson, is only available for "academic" dismissals that are carried out by the promotions committee. *Id.*

"To be entitled to the procedural protections of the Fourteenth Amendment, [Kim must first] demonstrate that [his] dismissal from the school deprived (him) of either a 'liberty' or a 'property' interest." *Board of Curators of Univ. of Missouri v. Horowitz,* 435 U.S. 78, 82, 98 S. Ct. 948, 951 (1978). The United States Supreme Court assumes that a liberty or property interest exists in school dismissal cases. *See e.g., Horowitz,* 435 U.S. at 84-85, 98 S. Ct. at 952. Therefore, Kim meets the initial hurdle for asserting a due process claim.

Next, Kim must produce evidence that UASOM failed to meet minimum due process standards when it dismissed him. In the "landmark" case of *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, *cert. denied*, 368 U.S. 930, 82 S. Ct. 368

(1961), the former Fifth Circuit[3] recognized that students facing expulsion from a tax-supported educational institution[] are entitled to the protections of the due process clause. *G[]oss v. Lopez,* 419 U.S. 565, 576, 95 S. Ct. 729, 737 (1975). Specifically, such students are entitled to notice and an opportunity to be heard. *Horowitz,* 435 U.S. at 85-86, 98 S. Ct. at 952-53. (citations omitted). However, clarified the court, the opportunity to be heard need only be in the form of an "informal give-and-take." *Id.*

The Fifth Circuit further clarified the due process standards, by noting that the *Dixon* requirements are limited to "disciplinary" expulsions. *Mahavongsanan v. Hall,* 529 F.2d 448, 449 (5th Cir. 1976).

> Misconduct and failure to attain a standard of scholarship cannot be equated. A hearing may be required to determine charges of misconduct, but a hearing may be useless or harmful in finding out the truth concerning scholarship. There is a clear dichotomy between a student's due process rights in disciplinary dismissals and in academic dismissals.

Id. at 450.

In *University of Missouri v. Horowitz,* the United States Supreme [C]ourt ratified the Fifth Circuit's analysis by recognizing that there is a "significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for far less stringent procedural requirements in the case of an academic dismissal." 435 U.S. at 86, 98 S. Ct. at 953. Accordingly, concluded the Supreme Court, "a hearing is not required by the Due Process Clause of the Fourteenth Amendment." *Id.* at 86 n.3, 98 S. Ct. at 953 n.3. Due process

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[3] The Eleventh Circuit has adopted as precedent all Fifth Circuit Court of Appeals cases decided prior to October 1, 1981. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981).

merely requires that school officials engage in a "careful and deliberate" "decision-making process" before expelling a student for academic reasons. *Haberle v. University of Alabama in Birmingham,* 803 F.2d 1536, 1539 (11th Cir. 1986) (citing *Horowitz*, 435 U.S. at 85, 98 S. Ct. at 952)).

Applying the "careful and deliberate" test, Kim's procedural due process claim cannot survive summary judgment. He has produced no evidence which would indicate that UASOM's decision to expel him was reached without care and deliberation. Although Nelson alone made the original dismissal decision, the promotions committee not only ratified her decision, but also agreed that Kim's dismissal was not academic and therefore he was not entitled to utilize the three person panel. Nelson Dep., at 113-14. UASOM then allowed Kim two opportunities to be heard. Kim first appealed to Dr. Nelson and then to Dr. Fallon, the Dean of the medical school. Nelson Dep., at 115. Finally, all of the decision makers were aware of Kim's personal and medical school history. *See id.*

Thus, not only did UASOM met the constitutionally mandated procedural due process requirements for academic dismissals, by making a careful and deliberate decision, but UASOM also met the due process requirements for disciplinary dismissals, by allowing Kim an opportunity to he heard. Indeed, UASOM exceed the minimum requirements of due process by allowing Kim two opportunities to be heard. Whether or not UASOM followed [its] normal appeal procedures is irrelevant for purposes of procedural due process. "The fact that the procedures used were ad hoc does not violate the Horowitz standard; no formal hearing is required." *Haberle*, 803 F.2d at 1539.

Nonetheless, UASOM's failure to follow its standard appeal procedures is not wholly irrelevant. Failing to follow established dismissal procedures does subject the decision maker to a substantive due process challenge. Such challenges, however, only provide a "narrow avenue for judicial

review." *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 227, 106 S. Ct. 507, 514 (1985).

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Haberle, 803 F.2d at 1539 (emphasis supplied) (citing *Ewing*, 474 U.S. 214, 106 S. Ct. 507).

This narrow avenue for judicial review was utilized in *University of Michigan v. Ewing*, where the defendant medical school dismissed the plaintiff, a second year medical student, after he experienced academic difficulties and failed to obtain an acceptable score on his national board examination. 474 U.S. 214, 106 S. Ct. 507. Because Ewing, like Kim, could only advance to his third year if he obtained a satisfactory score on the national board test, the University expelled him after he scored the lowest in the program's history. When the University refused to allow him to retake the examination, Ewing sued, contending, *inter alia*, that his due process rights were violated because the medical school denied him the procedure available to other students: namely, the opportunity to re-take the examination. The United States Supreme Court found that the University did not violate Ewing's substantive due process rights by refusing his request to re-take the examination. "[W]hen viewed against the backdrop of his entire career at the University...," the Supreme [C]ourt found that Ewing's dismissal "rested on academic judgment that [was] not beyond the pale of reasoned academic decision-making." *Ewing*, 414 U.S. at 227-28, 106 S. Ct. at 514-15. Therefore, the uiniversity's departure from its normal procedure of allowing retakes was not fatal. See *id.* Further, noted the [C]ourt, there was no evidence that the

facts of Ewing's case made him similarly situated to those students who had been allowed to re-take the national board examination. *Id.* at 228 n.14, 106 S. Ct. at 515 n.14. Consequently, Ewing's termination did not "substantially deviate from accepted academic norms when compared with [the defendants'] treatment of other students." *Id.*

Given the circumstances in the case presently before the court, UASOM's decision, like the decision in *Ewing,* was not "beyond the pale of reasoned academic decision-making." *See id.* at 227-28, 106 S. Ct. at 514-15. Kim had five opportunities to take the national board exam (two more opportunities than other students), but he had failed to sit for a single exam. Kim was well aware that continued enrollment in the program was conditioned upon a passing examination score and that UASOM required its medial school students to obtain a passing score within three examinations. Kim did not take the examination within the required time frame. "Therefore, he is not entitled to continue to pursue the [degree]. There is nothing arbitrary about such a requirement." *Haberle*, 803 F.2d at 1541. While UASOM had been very understanding of Kim's personal crises in the past, it was under no obligation to further excuse him from the program requirements.

Moreover, like Ewing, Kim cannot produce evidence that there were other similarly situated students who were treated more favorably. Consequently, this court has no comparators against which to evaluate UASOM's decision. Without such comparators and given Kim's repeated failure to meet UASOM's requirements for continued enrollment, Kim cannot show that UASOM's decision was arbitrary or that the medical school failed to exercise "professional judgment." *See Haberle,* 803 F.2d at 1539. Thus summary judgment for the defendants will be granted on Kim's procedural and substantive due process claims.

VI. AMERICANS WITH DISABILITIES ACT ("ADA") CLAIMS

A. ADA Claims Asserted Against The Individual Defendants

Both Dr. Nelson and Dr. Fallon correctly assert that they are improper defendants inasmuch as Kim asserts ADA claims against them in their individual or official capacities. The ADA "does not provide for individual liability, only for employer liability." *Mason v. Stallings,* 82 F.3d 1007, 1009 (11th Cir. 1996). Therefore, the court will grant summary judgment to Nelson and Fallon on Kim's ADA claim.

B. ADA Claims Asserted Against UASOM

When the current motion for summary judgment came under submission, UASOM did not have the benefit of this court's January 13, 1998, opinion in *Garrett v. Board of Trustees of the Univ. of Alabama in Birmingham,* CV-97-AR-0092-S. Accordingly, UASOM did not raise an Eleventh Amendment Immunity defense in response to Kim's ADA claim. Consistent with the *Garrett* decision, the court holds that UASOM is immune from suit under the ADA and is therefore entitled to summary judgment on said claim.

Even if UASOM were not entitled to Eleventh Amendment immunity, Kim's ADA claim could not survive. To establish a prima facie case for disability discrimination Kim must show that: (1) he has a disability;[4] (2) he is a qualified individual; and (3) he was subjected to unlawful discrimination because of his disability. *Holbrook v. City of Alpharetta,*

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[4] The ADA defines a disability as: "a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; B) a record of such impairment; or C) being regarded as having such an impairment." 42 U.S.C. § 12101(2). Kim asserts that he is disabled for purposes of the ADA because UASOM regarded him as having an impairment. Although UASOM contends that Kim does not meet any ADA definition of disability, the court assumes that Kim is disabled fur purposes of this motion for summary judgment.

112 F.3d 1522, 1526 (11th Cir. 1997) (citations omitted). A qualified individual with a disability is one who can "perform the essential functions as a [UAB] medical student despite his disability or with a reasonable accommodation for his disability." *Ellis v. Morehouse School of Medicine*, 925 F. Supp. 1529, 1540 (N.D. Ga. 1996).

Kim is unable to make out a prima facie case for disability discrimination because he cannot show that he is a qualified individual with a disability. As discussed in this court's analysis of his race discrimination claim, Kim failed to meet the objective criteria for continued enrollment in the medical school, by failing to obtain a passing [s]core on the USMLE within the requisite number of examinations. Consequently, Kim is not qualified to remain in the program and therefore cannot make out a prima facie case for disability discrimination.

Second, Kim's prima facie case fails because he is unable to produce evidence that his dismissal was based upon his disability. Nelson's comments regarding Kim needing psychiatric help do not establish improper motive. There is no evidence which might even remotely suggest that an improper motive entered into the ultimate decision made by Dean Fallon to affirm Kim's dismissal. Kim simply did not meet the program requirements.

Finally, even if Kim could make out a prima facie case of disability discrimination he still could not survive summary judgment. Although UASOM had a duty to provide reasonable accommodations that would have enabled Kim to meet the requirements of the program, the court determines, as a matter of law, that UASOM fulfilled this duty. "[T]he point is not whether a medical school is 'right' or 'wrong' in making program-related decisions." *Wynne v. Tufts Univ. School of Medicine,* No. Civ.A. 88-1105-Z, 1992 WL 46077 (D. Mass. 1992), *aff'd*, 976 F.2d 791, 795 (1st Cir. 1992), *cert. denied*, 507 U.S. 1030, 113 S. Ct. 1845 (1993). This court can only review the expulsion "to determine if [Kim] presents

evidence that [UASOM's] decision to dismiss him was so arbitrary or irrational as to not constitute an exercise of professional judgment." *See Ellis,* 925 F. Supp. at 1543, 1541-[4]2 (applying the deferential due process standard in academic dismissal cases where the plaintiff alleges discrimination). "That [UASOM] could have provided a different set of reasonable accommodations or more accommodations does not establish that the accommodations provided were unreasonable or that the additional accommodations were necessary." *Wynne,* 1992 WL 46077, at *1.

There is nothing in the record to suggest that UASOM's dismissal of Kim was "so arbitrary or irrational as to not constitute an exercise of professional judgment." *See Ellis,* 925 F. Supp. at 1543. UASOM more than reasonably accommodated Kim's disability for several years. It granted Kim a retroactive leave of absence, excused Kim's failure to sit for the two 1994 examinations and allowed him three more opportunities to take the USMLE. However, Kim exhausted his three additional opportunities without even sitting for the examination. UASOM was under no duty to further excuse him from the essential requirements of the program. *See id.* at 1547 (noting that the defendant "is only required to accommodate [the plaintiff] to the extent that such accommodation would not fundamentally alter the nature of its program") (citing *Southeastern Community College v. Davis,* 442 U.S. 397, 409, 99 S. Ct. 2361, 2368-69 (1979)). Therefore, like his other claims, his ADA claim also fails.

VII. Conclusion

Because no genuine issues of material fact are in dispute, the defendants are entitled to summary judgment on all claims asserted by Kim.

DONE this 12th day of March, 1998.

/s/ William M. Acker
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 28 1999
THOMAS K. KAHN
CLERK

No. 98-6248

ANDREW K. KIM,

Plaintiff-Appellant,

versus

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, for its division, The University of Alabama School of Medicine; HAROLD J. FALLON, M. D., et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Alabama

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____F.2d ____).

Before: TJOFLAT, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [illegible]
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

Supreme Court, U.S.
FILED
SEP 24 1999
OFFICE OF THE CLERK

(2)

No. 99-353

In The

Supreme Court of the United States

ANDREW K. KIM,

Petitioner,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, for its division, the University of Alabama School of Medicine, HAROLD J. FALLON, M.D., and KATHLEEN G. NELSON, M.D.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the District Court was correct in granting summary judgment in favor of the University of Alabama School of Medicine (UASOM) on Appellant's claim that he was denied due process in his dismissal from medical school.

PARTIES TO THE PROCEEDING

Respondent University of Alabama School of Medicine (UASOM), is a division of the Board of Trustees of the University of Alabama, a body corporate, which is an agency of the State of Alabama, as set forth in Code of Ala. (1975), § 16-47-1, et seq. Respondents Kathleen G. Nelson, M.D., and Harold J. Fallon, M.D., are faculty and administrators of the UASOM.

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STATEMENT OF THE CASE

Petitioner, Andrew Kim initially enrolled in the University of Alabama School of Medicine (UASOM) in 1991. Kim requested and was granted a leave of absence for personal reasons from May 1993 through January 1994, at which time he returned to the UASOM and completed his second year of study. In order to advance to the third year of study at the UASOM and most medical schools in the United States, a student *must* satisfy the academic requirement of obtaining a passing score on Step I of the United States Medical Licensing Exam (USMLE). The UASOM allows a student three opportunities to take Step I of the USMLE. App. B2-3.

Kim failed to take the USMLE, after having completed his second year of study, on the ground that he was unprepared. App. B2. Kim next stated his intention to take the USMLE in September 1994, but failed to take it on that occasion because of depression. App. B3. After having been notified by Associate Dean C.W. Scott that his failure to take the September 1994 exam would be considered evidence of his intent to withdraw, unless explained, Kim requested and was granted another leave of absence through June 1995. Dean Scott informed Kim explicitly that he was expected to sit for the USMLE in June 1995. App. B3.

Again, Kim failed to sit for the USMLE in June 1995, on the ground that he was unable to return to Birmingham, but said in a belated letter that he would take the exam in September. App. B3. Upon his return to Birmingham, after having missed the June 1995 exam,

Kim was invited to meet with Scott's replacement, Associate Dean Kathleen Nelson, who insisted that Kim register to take the September 1995 exam. In lieu of taking the September 1995 USMLE, however, Kim requested that he be allowed to repeat by audit his second year of medical school in preparation to take Step I of the USMLE in June 1996. Kim's request was granted by Dean Nelson. App. B3-4.

After having been allowed another academic year to prepare for the USMLE, Kim failed, once again, to take Step I of the exam in June 1996, due to problems arising out of a relationship with a young woman. Kim did not notify the UASOM that he had withdrawn his registration until after the test date, which was the fifth opportunity he had been afforded to take the USMLE. Kim was then notified of his dismissal by letter from Dean Nelson. App. B5.

Kim requested a hearing before Dean Dennis Boulware, the Associate Dean for Undergraduate Medical Education. Instead of the hearing before Boulware, Kim was allowed to present his appeal for reinstatement to Dean Nelson, who, with the approval of the UASOM Promotions Committee, affirmed Kim's dismissal. Kim was then permitted to appeal to the Dean of the UASOM, Harold Fallon. Kim appeared before Fallon, with an advisor of his choice, and was given an opportunity to explain the reasons for his final failure to take the USMLE. App. B6. Fallon subsequently denied Kim's request for reinstatement.

Kim filed suit in the United States District Court for the Northern District of Alabama, Southern Division, in

which he alleged discrimination on the bases of race and disability, and alleged further that he had been denied due process in his dismissal by the UASOM. App. B1. Subsequent to the entry of summary judgment in favor of the defendants on all claims, Kim appealed only the denial of due process claim to the Eleventh Circuit Court of Appeals. App. A1-2.

The Eleventh Circuit's application of the de novo standard of review resulted in an affirmation of the district court's judgment in favor of the University. The court found, as had the district court, that Kim had been afforded the required due process and that "minor discrepancies" between the procedure afforded Kim and that outlined in the student handbook were justified by the "hybrid" nature of the case. Kim's petition for en banc review by the Eleventh Circuit was denied. App. C1.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THERE IS NO SPLIT AMONG THE CIRCUIT COURTS THAT WOULD REQUIRE GRANTING THE PRESENT WRIT

Petitioner's entire argument in support of the present writ is premised upon his insistence that his dismissal from the University of Alabama School of Medicine (UASOM) should be regarded as a *disciplinary* dismissal. He argues that if his dismissal was disciplinary in nature, he was entitled to have received different due process than was actually afforded him. Petitioner's argument is without merit.

The facts in this case show that Petitioner, Kim, was afforded five opportunities in which to satisfy an academic requirement for succession to the third year of study at the UASOM; that is, achieving a passing score on Step I of the United States Medical Licensing Exam (USMLE). App. B5, A3, 5. For the variety of reasons Kim has offered, he failed to sit for the exam a single time prior to his dismissal. There has been no dispute in this case that the UASOM policy provided for three opportunities to pass the USMLE in order to advance to year three of medical school. Notwithstanding these facts, Petitioner argues in his Writ that he was not actually allowed three opportunities to take the exam, since the UASOM had repeatedly excused his failure to do so prior to 1996. Petitioner's reasoning fails to acknowledge the specific expectations regarding his taking the USMLE, which were communicated to him from 1994-1996. App. B3-4. Both the district court and the Eleventh Circuit properly concluded that Kim had been given five opportunities to meet the academic requirement of achieving a passing score on Step I of the USMLE but had repeatedly failed to sit for the exam. App. B5, A3, 5.

Kim argues that because his dismissal was not handled by the UASOM as the catalog provided for dismissal due to academic failure, his dismissal must be regarded as a disciplinary action. The UASOM Promotions Committee reviews the academic progress of every student and may recommend dismissal of a student who has failed to achieve acceptable grades. Kim's failure to take the USMLE was not a typical case of academic failure,

however. At the time he was dismissed, Kim had not been actively enrolled in the UASOM for more than two years, and it had been three years since he would normally have taken the USMLE in order for him to have advanced with his class. App. A3. Kim had not failed any of his courses in the first two years of medical school. Neither had Kim committed any act of misconduct that would have warranted disciplinary action. Kim simply failed to satisfy an academic prerequisite for advancement. As Dean Nelson explained, she conferred with the Promotions Committee concerning Kim's repeated failure to take the USMLE. The Promotions Committee agreed that Kim's dismissal required administrative action since it was not typical of a dismissal initiated by the Committee. App. B13.

Kim's continued failure to take the USMLE, presented a unique circumstance that did not fit the typical academic deficiency case for which action by the UASOM Promotions Committee would have been initiated. The Eleventh Circuit concluded,

> The district court did not err in crediting the University's explanation that these minor departures were warranted because Kim's dismissal was a hybrid case (involving aspects of both academic and disciplinary dismissal) and did not fit the type of dismissal for which initiation by the promotions committee would be warranted. At any rate, regardless of slight variations, Kim received the notice and informal discussion to which he was entitled, in the form of meetings with Drs. Fallon and Nelson.

App. A4.

In his quest to portray his dismissal as disciplinary in nature, Petitioner states flatly that the district court "recognized" that Kim was not dismissed for academic reasons, and that Dean Nelson "effectively admitted" that Kim's dismissal was "punishment" for having failed to give the UASOM notice that he was not taking the USMLE in June 1996. Writ, p. 6. Petitioner's remarks are out-of-context extrapolations that are inconsistent with the court's Memorandum Opinion and Dean Nelson's deposition testimony. App. B1-22, R-19, pp. 63-64, Nelson Deposition. The district court and the Eleventh Circuit recognized that Kim's dismissal did not fit within the procedural scheme that usually triggered the initiation of dismissal by the UASOM Promotions Committee. Neither court concluded, however, as Petitioner would have this Court believe, that Kim's dismissal was for any reason other than his failure to satisfy an *academic* prerequisite to advancement. App. B8, A5. Both the district court and the Eleventh Circuit held that Kim was given the constitutionally mandated notice and opportunity to be heard, first by appealing his dismissal to Dean Nelson and subsequently by appealing Nelson's decision to Dean Harold Fallon, Dean of the UASOM. Kim appeared before Fallon with an advisor and admitted, in his deposition, that Fallon had given him the opportunity to present his explanation for failing to take the USMLE. App. B6, A3-4.

Petitioner calls the Court's attention, in particular, to three cases in support of his contention that he was denied due process in his dismissal: *Gorman v. University of Rhode Island*, 837 F.2d 7 (CA1 1988); *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299 (CA6 1984), *cert.*

denied, 469 U.S. 1113 (1985); and *Woodis v. Westark Community College*, 160 F.3d 435 (CA8 1998). Each of the foregoing cases is easily distinguishable from the facts of the present case. Gorman, Hall and Woodis were expelled for what were irrefutably instances of misconduct. All three cases were instances of purely disciplinary violations. Petitioner strains credulity to the absurd by his continued insistence that Kim's failure to satisfy an *academic* requirement for advancement should be equated to abuse, harassment, a drug offense and cheating, which were the disciplinary grounds for dismissal in the foregoing cases.

The due process analyses by the district court and by the Eleventh Circuit in this case are correct and consistent with the facts presented. As the Eleventh Circuit said, in *Mahavongsanan v. Hall*, 529 F.2d 448, 449 (5th Cir. 1976).

> Misconduct and failure to attain a standard of scholarship cannot be equated. A hearing may be required to determine charges of misconduct, but a hearing may be useless or harmful in finding out the truth concerning scholarship. There is a clear dichotomy between a student's due process rights in disciplinary dismissals and in academic dismissals.

Id. at 450. In *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 98 S.Ct. 948 (1978), the Court held, as in the present case, that notice and an opportunity to be heard are the procedural process to which a student is entitled, and said further that the opportunity to be heard need not be a hearing, but need only be an "informal give-and-take." *Id.*, 435 U.S. at 85-86, 98 S.Ct. at 952-53 (*citations omitted*). Citing *Horowitz*, the Eleventh

Circuit has said that in meeting its due process obligation, the school official must engage in a "careful and deliberate" process in arriving at the decision, before a student is expelled. *Haberle v. University of Alabama in Birmingham*, 803 F.2d 1536, 1539 (11th Cir. 1986) (*citing Horowitz*, 435 U.S. at 85, 98 S.Ct. at 952).

In its review of the evidence presented, the district court found that the UASOM satisfied not only the due process standard applicable in cases of *academic* dismissal, but had also afforded Kim sufficien opportunity to be heard to satisfy the procedural due process requirements of a disciplinary dismissal. Kim was given notice and *two* opportunities to be heard. The Promotions committee ratified the dismissal decision and agreed with Nelson that since it was not a case of academic failure, but presented an atypical situation, the process for appealing an academic failure was inappropriate. Instead, Kim was given *two* opportunities to be heard by decision makers who were aware of his history. The district court correctly concluded,

> Thus, not only did UASOM meet the constitutionally mandated procedural due process requirements for academic dismissals, by making a careful and deliberate decision, but UASOM also met the due process requirements for disciplinary dismissals, by allowing Kim an opportunity to be heard. Indeed, UASOM exceeded the minimum requirements of due process by allowing Kim *two* opportunities to be heard. Whether or not UASOM followed [its] normal appeal procedures is irrelevant for purposes of procedural due process. "The fact that

> the procedures used were ad hoc does not violate the Horowitz standard; no formal hearing is required." *Haberle*, 803 F.2d 1539.

App. B16.

Although Kim's Complaint failed to specify whether he was also asserting a substantive due process claim, the district court applied that analysis as well. Both the district court and the Eleventh Circuit agreed that Kim's claim that his dismissal from the UASOM violated substantive due process was without merit. The district court, citing another case involving the dismissal of a medical student recognized that substantive due process challenges provide only, "a narrow avenue for judicial review." *Regents of the Univ. of Michigan v. Ewing*, U.S. 214, 227, 106 S.Ct. 507, 514 (1985). This principal was reiterated by the Eleventh Circuit. *Haberle*, 803 F.2d at 1539.

Ewing, like Kim, failed to satisfy the requirement that he pass the USMLE before he could advance to the third year of medical school (albeit, Kim failed even to *sit* for the exam). Ewing sued, claiming in part, the denial of substantive due process, because he was not allowed to repeat the exam, a right that had been extended to other students. In that case, the Court declined to find a denial of substantive due process, stating that the decision to deny Ewing the opportunity to retake the exam and to dismiss him, "[W]hen viewed against the entire backdrop of his entire career at the University . . . rested on academic judgment that [was] not beyond the pale of reasoned academic decision-making." *Ewing*, 414 U.S. at 227-28, 106 S.Ct. 514-15.

In *Ewing*, the Court observed, there was no evidence that Ewing was similarly situated to other students who had been allowed to repeat the exam. Here, as the district court noted, Kim failed to present any evidence whatsoever that any comparator existed who had been treated differently by the UASOM. Kim had five opportunities to sit for the USMLE and had failed to do so on each occasion, although he was aware that UASOM policy afforded students three chances to achieve a passing score on the exam. The court noted, "While the UASOM had been very understanding of Kim's personal crises in the past, it was under no obligation to continue to excuse him from the program requirements." App. B18. Kim's dismissal because of his failure to satisfy the academic requirement for advancement cannot be characterized fairly as an arbitrary decision. *Haberle*, 803 F.2d at 1541.

Petitioner's argument that he was denied adequate due process cannot withstand serious analysis. The record in the present case reveals a sincere and protracted effort by the UASOM to accommodate the Petitioner's many excuses for having failed to satisfy an academic requirement for advancement. Notwithstanding Petitioner's effort to convince this Court that he was denied due process, the analyses applied by both the district court and by the Eleventh Circuit are correct. The present Petition should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6248
Non-Argument Calendar

D.C. Docket No. CV-96-AR-2797-S

ANDREW K. KIM,

Plaintiff-Appellant,

versus

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, for its division, The University of Alabama School of Medicine; HAROLD J. FALLON, M.D., et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama

(December 29, 1998)

Before TJOFLAT, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Andrew K. Kim appeals the district court's grant of summary judgment for the Board of Trustees of the University of Alabama (the "University"). The sole issue on appeal is whether the district court

properly determined that there was no genuine issue of material fact regarding Kim's 42 U.S.C. § 1983 claim that the University denied him procedural and substantive due process when it dismissed him from enrollment at the University of Alabama School of Medicine ("UASOM").

Kim originally enrolled at UASOM in July 1991. From May 1993 to January 1994, he sought, and was granted, a leave of absence from UASOM due to personal reasons. He returned in January 1994 and finished his second year of medical school, but felt unprepared to take Step One of the United States Medical Licensing Examination ("USMLE Step One"), which is required for medical students to advance to the third year of medical school. He planned to take USMLE Step One in September 1994 instead, but was unable to do so because of depression over certain family problems. Kim then received a second leave of absence from UASOM which was retroactive to June 1994 and continued until June 1995. The associate dean who granted this second leave of absence emphasized that Kim was expected to take the USMLE Step One in June 1995. However, Kim failed to return to Birmingham in June 1995 to take the USMLE Step One. In a letter to UASOM administrators, Kim indicated that he would sit for the test in September 1995. UASOM informed Kim in response that the September 1995 USMLE Step One would be his last chance to take the exam. Kim did not take the September 1995 exam, but instead requested permission to repeat his second year of school. He was granted permission to retake a course and audit other courses. In June 1996, however, due to further personal problems, Kim once again failed to take the

USMLE Step One, this time without notifying UASOM officials of his withdrawal from the June 1996 exam. This was the fifth exam that Kim missed, and three years had passed since the normal time for taking the USMLE Step One. UASOM officials then terminated Kim as a medical student, giving him two appeal opportunities in the process.

This Court applies a de novo standard of review to a district court's grant of summary judgment. *See, e.g., Scala v. City of Winter Park*, 116 F.3d 1396, 1398 (11th Cir. 1997). Summary judgment is appropriate if the record shows no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See, e.g., Eberhardt v. Waters*, 901 F.2d 1578, 1580 (11th Cir. 1990). "All evidence and reasonable factual inferences drawn therefrom are reviewed in the light most favorable to the party opposing the [summary judgment] motion." *Warren v. Crawford*, 927 F.2d 559, 561-62 (11th Cir. 1991).

Under the Fourteenth Amendment Kim was entitled to a certain minimal level of procedural due process before he could be dismissed from medical school. *Board of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 82, 98 S. Ct. 948, 951, 55 L.Ed.2d 124 (1978); *Haberle v. University of Alabama at Birmingham*, 803 F.2d 1536, 1539 (11th Cir. 1986). This procedural due process includes as its basic elements notice and an opportunity to be heard. *Horowitz*, 435 U.S. at 85-86, 98 S. Ct. at 952-53. However, in certain circumstances a mere "informal give-and-take" may satisfy this requirement. *Id.*

In the instant case, Kim was given the constitutionally required notice and opportunity to be heard. Kim

was allowed to appeal to Dr. Nelson, Associate Dean of Students, and then to Dr. Fallon, Dean of UASOM. He admitted in his deposition that he believed Dr. Fallon had listened to his explanation of the circumstances surrounding his failure to sit for the USMLE Step One. Procedural due process requires nothing more. *See Haberle*, 803 F.2d at 1539 ("The fact that the procedures used were ad hoc does not violate the *Horowitz* standard; no formal hearing is required"). Kim points to minor discrepancies between the appeal procedure outlined in the student manual and the procedure that was actually provided in his case.[1] The district court did not err in crediting the University's explanation that these minor departures were warranted because Kim's dismissal was a hybrid case (involving aspects of both academic and disciplinary dismissal) and did not fit the type of dismissal for which initiation by the promotions committee would be warranted. At any rate, regardless of slight variations, Kim received the notice and informal discussion to which he was entitled, in the form of meetings with Drs. Nelson and Fallon.

Kim argues also that his dismissal from UASOM was so arbitrary as to violate substantive due process rights under *Regents of the University of Michigan v. Ewing*, 474

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[1] The UASOM handbook stated that a student who suffers adverse action by a three-member promotions committee may appeal the committee's action by filing a timely notice of his intent to appeal. The appeal is heard first by the Associate Dean for Undergraduate Medical Education, and then by the Dean. In the instant case, the initial decision to dismiss Kim was made not by the promotions committee but by Dr. Nelson, Associate Dean of Students, who then presented her decision to the promotions committee and had it ratified by them.

U.S 214, 106 S. Ct. 507, 88 L.Ed.2d 523 (1985). *Ewing* assumed *arguendo* a substantive right under the Due Process Clause with respect to academic decisions that are "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Id.* at 225, 106 S. Ct. at 513. Such challenges, however, provide only a "narrow avenue for judicial review," *id.* at 226, 106 S. Ct. at 514, and the judgment of university decisionmakers will be respected unless it is "beyond the pale of reasoned academic decision-making," *id.* at 227-28, 106 S. Ct. at 514-15. Kim had failed to sit for the USMLE Step One five times in a row, in clear contravention of UASOM policy. Under these circumstances, the district court properly concluded that the University was entitled to summary judgment on the assumed substantive due process claim as well as on the procedural due process claim. *Cf. Haberle*, 803 F.2d at 1539-41 (holding that when a university dismissed a Ph.D student for failing to take a prerequisite qualifying exam, there "was not such a substantial departure from academic norms as to amount to an arbitrary deprivation of property").

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ANDREW W. KIM, Plaintiff vs. THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, for its division, the UNIVERSITY OF ALABAMA SCHOOL OF MEDICINE, HAROLD J. FALLON, M.D., and KATHLEEN G. NELSON, M.D., Defendants	CIVIL ACTION NO. CV-96-AR-2797-S (Filed Mar. 12, 1998)

MEMORANDUM OPINION

Presently before the court is a motion for summary judgment made by the defendants, The Board of Trustees of the University of Alabama for its division, the University of Alabama School of Medicine ("UASOM" or "UAB"), Harold J. Fallon, M.D. ("Fallon"), and Kathleen G. Nelson, M.D. ("Nelson"). Plaintiff Andrew W. Kim ("Kim") sues the defendants alleging that they expelled him from the medical school in violation of his Fourteenth Amendment right to due process, and his right to be free from both racial discrimination, 42 U.S.C. §§ 1981, 1983, and disability discrimination, 42 U.S.C. § 12101. Because there is no dispute as to any genuine issues of

material fact, summary judgment for defendants is appropriate.

I. FACTS[1]

Andrew Kim is a Korean born naturalized citizen who attended the University of Alabama Medical School. Kim enrolled in July 1991 and performed satisfactorily. By the spring of 1992, however, Kim sought counseling for depression which had been precipitated by his brother's death. On May 18, 1993, Kim requested, and was granted, a leave of absence from UAB. The leave of absence was effective from April 16, 1993 through January 1994. While on leave, the wife of the deceased brother committed suicide, but Kim returned to UAB in January 1994 and finished his second year.

In order to advance to the third year of medical school at UAB, and most American medical schools, a medical student must pass Part One of the United States Medical Licensing Examination ("USMLE"). This examination is offered yearly, in June and in September.

After returning from his leave of absence, in January 1994, and completing his second year, Kim felt unprepared for the June 1994 USMLE. Def.'s Ex. 13 ("I did not take the USMLE, Step 1. Perhaps I did not give it my best effort or studied at too slow pace [sic]. On the day before the exam I still felt that I would not be

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[1] The facts are presented in the light most favorable to the plaintiff. *Swint v. City of Wadley*, 51 F.3d 988, 995 (11th Cir. 1995). The court notes, however, that neither party bothered to support its summary of facts with citations to the record.

successful on the first attempt. I apologize for my action and hope that I did not violate school rules."). Therefore he notified the appropriate medical school official and indicated that he would try to take the September 1994 examination. Because of his depression, however, he was unable to take the September 1994 examination.

In early October, Associate Dean C.W. Scott, Jr. ("Scott"), informed Kim by letter that his failure to take the two 1994 examinations would be considered a withdrawal from the medical school, unless Kim contacted Scott by a specified date with an acceptable explanation. Def.'s Ex. 2. Kim met with Scott in a timely manner and explained his family problems. Scott granted Kim a second leave of absence which was retroactive to June 1994 and continued until June 1995. Def.'s Ex. 3. Scott emphasized, however, that Kim was expected to take the June 1995 USMLE. *Id.*

On May 30, 1995, Kim sent a letter to UAB indicating that he would not be able to return to Birmingham in sufficient time to study for the June examination, but that he would sit for the test in September. Def.'s Ex. 4. The letter did not arrive until June 16, 1995. At this point, Kim had failed to sit for the USMLE on three occasions since returning from his second [sic] leave of absence: June 1994, September 1994, and June 1995. The UASCM student handbook provides that a second year student has three opportunities to pass the examination. Def.'s Ex. 1, at p. 64. When Kim returned to campus after missing the June 1995 examination, he met with defendant, Kathleen G. Nelson ("Nelson"), who was the new Associate Dean, replacing Dr. Scott. Nelson insisted that Kim register for the September USMLE. Nelson also sent Kim a letter

indicating that the September 1995 s[i]tting would be his last opportunity to take the exam. Def.'s Ex. 5. Kim insists, however, that he did not receive this letter.

Although Kim registered for the examination, he did not take the September USMLE. Instead he requested permission to repeat his second year of school. Kim believed this would more adequately prepare him for the June 1996 examination. Nelson granted his request and allowed Kim to re-take a course and audit several additional courses.

During the academic year, however, he became romantically involved with a woman who threatened him after the relationship ended. The woman and her mother carried through with these threats by fabricating a story and sharing it with medical school personnel. The women claimed that Kim had kidnapped the former girlfriend and committed other sordid acts. As a result of these allegations Nelson met with Kim and advised him to stay [a]way from the women. Kim then filed charges against the women with the Birmingham police department. He shared a copy of this report with Nelson who subsequently shared the report with defendant, Dr. Fallon, and an instructor in the undergraduate department where the former girlfriend was enrolled. The undergraduate instructor discussed the report with the former girlfriend and the threats from the woman increased. Eventually, Kim complained to UAS police about the women and the harassment stopped.

As a result of these events, Kim was unprepared for the June 1996 USMLE. "Knowing that the student catalogue provided three chances to take the USMLE examinations, he contacted the National Board on June 8, 1996, that he was withdrawing from the June exam." Pl.'s Br. at p. 4. Because he was embarrassed, Kim did not inform Nelson of his failure to sit for the examination. Nine days after he notified the National Board, Nelson sent a letter to Kim terminating him as a medical student for failing to take the USMLE. Def.'s Ex. 7. This was the fifth examination that Kim missed.

Kim immediately requested reinstatement and/or an opportunity to appeal Nelson's decision. Nelson initially denied Kim's request and refused to allow Kim to obtain a copy of his medical school records. Nelson also suggested, on more than one occasion, that Kim attempt to transfer to a medical school in Korea or one of the historically African-American medical schools, such as Meharry or Morehouse. Kim testified that Nelson often used the phrase, "the three M's, Meharry, Morehouse, and minority." Kim Dep., at 115. Kim also alleges that Nelson described him as too polite and too passive. *Id.* at 115. Finally Nelson stated that Kim would not make a good medical doctor and that he needed further psychiatric help to overcome his depression. *Id.* at 117.

Following the academic dismissal appeal procedures found in the student handbook, Kim filed a formal notice of appeal in which he requested a hearing before the Associate Dean for Undergraduate Medical Education, Dr. Boulware. UAB denied Kim's request, but did permit Kim to meet first with Dr. Nelson and later with Dean Fallon. In his brief, filed in opposition to UASOM's

motion for summary judgment, Kim contends that Fallon did not allow Kim to rebut any information Nelson may have provided. In his deposition, however, Kim admitted that he believed Fallon had listened to what Kim had to say about the circumstances surrounding his failure to sit for the USMLE. Kim Dep., at 101. On July 5, 1996, Fallon denied Kim's request for reinstatement. Kim filed the present lawsuit on Octobe 24, 1996.

II. SUMMARY JUDGMENT STANDARD

Under the Federal Rules of Civil Procedure, summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." F.R.Civ.P. 56(c).

III. § 1981 & § 1983 CLAIMS ASSERTED AGAINST STATE ENTITY UASOM

Defendant UASOM first asserts that, pursuant to the Eleventh Amendment of the Constitution of the United States, it is immune from Kim's § 1981 and § 1983 claims. UASOM's assertion is correct. The Eleventh Circuit has unequivocally held that state entities are immune from both § 1981 and § 1983 suits. *Harden v. Adams*, 760 F.2d 1158, 1163 (11th Cir. 1985) (discussing Section 1983); *Sessions v. Rusk State Hospital*, 648 F.2d 1066, 1068 (5th Cir. 1981) (discussing Section 1981). Similarly there is no doubt that Alabama state universities are entities for purposes of Eleventh Amendment immunity. *Harden*, 760 F.2d at 1163. Consequently, UASOM is entitled to summary judgment on Kim's § 1981 and § 1983 claims.

If UASOM did not enjoy absolute immunity, it would not be liable for the reasons which follow in analyzing the § 1981 and § 1983 claims against the individual defendants.

IV. § 1981 & § 1983 RACE DISCRIMINATION CLAIMS ASSERTED AGAINST THE INDIVIDUAL DEFENDANTS

Kim argues that the issue of whether his expulsion was motivated by racial animus constitutes "a fact which should be decided by a jury." Pl.'s. Br. at 7. In support of this argument he points to Nelson's comment regarding transfer to a Korean medical school or one of the "three M's, Meharry, Morehouse and minority." Kim Dep., at 115, 117. Kim also claims that Nelson's description of him, as too polite and too passive, was racially derogatory. *Id.* Finally, Kim asserts, via his own affidavit, that discriminatory remarks by Nelson also precipitated the expulsion of another Korean medical student. Kim Aff. (Doc 19), at ¶5. Beyond this, Kim produces no other evidence to support his § 1981 and § 1983 claims.

Kim may make out his prima facie case for disparate treatment: (1) by producing direct evidence of discrimination, (2) by meeting the McDonnell Douglas[ ] circumstantial evidence framework, or (3) by demonstrating a pattern of discrimination using statistical data.[2] *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990).

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[2] "The Supreme Court has held that the test for intentional discrimination in suits under § 1981 is the same as the formulation used in Title VII discriminatory treatment causes." *Brown v. American Honda Motor Co., Inc.*, 939 F.2d 946, 949 (11th

A. Direct Evidence

Presumably, Kim contends that Nelson's comments constitute direct evidence and therefore he has made out a prima facie case of racial discrimination. Direct evidence is "evidence, which if believed, proves the existence of the fact in issue without inference or presumption." *Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 641 (11th Cir. 1998) (citations omitted & emphasis supplied). Consistent with this definition, any statements that Kim seeks to introduce as direct evidence must directly relate to Nelson's decision to dismiss him. *See id.* at 642. If Kim cannot show such a connection, between the comments and the dismissal, this court can only consider the comments as indirect evidence. *See Burrell v. Board of Trustees of Georgia Military College*, 125 F.3d 1390, 1393 (11th Cir. 1997).

Nelson's comments do not constitute direct evidence. Although such comments are distasteful, there is no evidence that her decision to dismiss Kim was motivated by racial animus. It is clear that Kim failed to meet the objective requirements for continued enrollment in the medical school program; therefore, this court cannot infer or presume that Nelson was motivated by racial animus when she expelled Kim. "Direct evidence, by definition, is evidence that does not require such an inferential leap between fact and conclusion." *Carter*, 132 F.3d at 642.

Cir. 1991), *cert. denied*, 502 U.S. 1058, 112 S. Ct. 935 (1992). The Title VII paradigm also applies to § 1983 cases because "[t]he section 1981 claim has been effectively merged into the section 1983 claim for racial discrimination." *Busby v. City of Orlando*, 931 F.2d 764, 771 (11th Cir. 1991).

Moreover, the record indicates that, until Kim failed to sit for his fifth USMLE, Nelson may have treated Kim more favorably than other students. Kim was aware that he was expected to sit for the June 1995 USMLE after he returned from his second leave of absence in January 1995. When he failed to take both the June and September examinations, Nelson allowed Kim to re-take and/or audit several classes rather than dismiss him from the program. However, Kim then failed to sit for the June 1996 [sic]. Now he complains that the same dean who allowed him to remain in the program for an additional year, despite his failure to sit for even one examination, held discriminatory attitudes which affected her decision to dismiss him from the program.

Even if this court were to assume Nelson held racially discriminatory attitudes, she was not the ultimate decision maker. Therefore her statements could not constitute direct evidence. *See LaMontagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1412 (7th Cir. 1984) (cited with approval in *Mauter v. Hardy Corp.*, 825 F.2d 1554, 1558 (11th Cir. 1987)). Dr. Fallon, the Dean of the Medical School, ratified Nelson's decision to dismiss Kim. There is certainly no evidence in the record that would even remotely suggest that Dr. Fallon, the ultimate decision maker, maintained racial animus when he affirmed Nelson's decision. Moreover, Fallon only affirmed Nelson's decision after personally hearing Kim's explanation for his failure to take the USMLE. Because Dean Fallon was the ultimate decision maker with the authority to overrule Nelson's decision, "the relevant inquiry" is into the motivation of Dr. Fallon. *See LaMontagne*, 750 F.2d at 1412. Therefore, any "chain of inference" from Nelson's

comments to the decision by Dr. Fallon to uphold the dismissal, "would be sheer speculation." *See id.* Consequently, Nelson's comments do not constitute direct evidence of discrimination.

B. Indirect evidence

Without direct evidence of discrimination, Kim must proceed, if at all, under the McDonnell Douglas indirect evidence framework by showing that: (1) he was a member of a protected group, (2) he was qualified, (3) he suffered adverse action at the hands of the individual defendants, and (4) he was dismissed "under circumstances that give rise to an inference of discrimination." *See Gitlitz v. Compagnie Nationale Air France,* 129 F.3d 554, 559 (11th Cir. 1997). If Kim can make out a prima facie case under the McDonnell Douglas framework, then the burden of production (not the burden of persuasion) shifts to UASOM to come forward with a legitimate nondiscriminatory reason for the dismissal. *See Trotter v. Board of Trustees of University of Alabama,* 91 F.3d 1449, 1454-55 (11th Cir. 1996). If UASOM can supply such a reason, the burden shifts back to Kim to produce admissible evidence from which a jury might find that UASOM's proffered reason is pretextual. *See id.*

Kim is unable to make out a prima facie case under the McDonnell Douglas[ ] indirect evidence framework because he cannot show that he was qualified to remain in the program. Continued enrollment, beyond the second year of the program, requires a passing score on the USMLE. The student handbook provides, however, that the student has three opportunities to obtain a passing

score. Kim failed to obtain a passing score after five examinations: two 1994 examinations, two 1995 examinations and the June 1996 examination. Even if this court were to overlook his failure to take the two 1994 examinations, because he was granted a retroactive leave of absence for that time period, Kim still was allowed three additional examination opportunities to pass without even sitting for the USMLE. Because he failed to meet the requirements for continued enrollment, he is not "qualfied" and cannot make out a prima facie for discrimination. [sic] His personal and emotional problems do not alleviate his duty, pursuant to the McDonnell Douglas[ ] paradigm, to establish that he was qualified to remain in the program.

Even if Kim could make out a prima fac[i]e case, his race discrimination claims fail because he is unable to produce any evidence from which a jury might find that UASOM's proffered nondiscriminatory reason for the dismissal is pretextual. Kim cannot create pre-text out of thin air by citing his own affidavit regarding the alleged discriminatory treatment of another Asian UASOM student. In the affidavit, Kim affirmed that he spoke with the mother of the other Asian student. Kim Aff. (Doc. 19), at ¶5. Apparently, the mother told Kim that UASOM dismissed her son in his fourth year of medical school and that Nelson had made disparaging remarks to the son regarding Asians. *Id.* This double hearsay is inadmissible. Fed. R. Evid. 801.

Even if such evidence were admissible, the mother's *conclusory* allegation, that UASOM dismissed her son because of his race, is not enough to support a finding of pretext. Consequently, summary judgment is appropriate

for the individual defendants on Kim's § 1981 and § 1983 race discrimination claims.

VI. [sic] FOURTEENTH AMENDMENT DUE PROCESS CLAIMS

Kim is unable to complain that UASOM violated his due process rights by refusing to allow him an opportunity to be heard, as required under the Due Process [C]lause of the Fourteenth Amendment to the United States Constitution. He does not dispute that Dr. Nelson, the Associate Dean of Students heard his first appeal. Kim Dep., at 98. Nor does Kim dispute that Dr. Fallon, the Dean of the Medical School, then heard Kim's second appeal. Kim Dep., at 99-101.

Rather than the inability to be heard, Kim complains that UASOM violated his *procedural* due process rights when it prevented him from utilizing the appeal process available to other students. Specifically, Kim complains that UASOM denied him an opportunity to take advantage of the appeal procedure described in the student handbook as well as the actual appeal procedure UASOM utilizes, but never memorialized.

The student handbook provides that a student who is dismissed from the medical school or suffers adverse action by the promotions committee, may appeal the committee's action by filing a timely notice of his intent to appeal. Student Handbook, Def's. Ex. 1, at p. 63. First and second year students "appeal first to the Associate Dean for Undergraduate Medical Education of the School of Medicine," in this instance Dr. Boulware. *Id.* at p. 64.

If the Associate Dean denies the appeal, the student may then appeal to the Dean of the School of Medicine, Dr. Fallon. *Id.* "The decision of the Dean will be final. No further appeal is offered by the School of Medicine. Academic appeal hearings are not legal proceedings. They constitute an opportunity for the student to be heard by an academic administrative official of the School of Medicine." *Id.* (emphasis supplied).

However, Dr. Nelson testified that UASOM actually uses an appeal procedure that differs from the one described in the student handbook. A three person panel, not solely Dr. Boulware, hears a student's first appeal in academic dismissal cases. Nelson Dep., at 103-106. However, Nelson did not utilize an appeal panel in Kim's case for two reasons. First, both Nelson and the promotions committee (which certifies each student to progress to the next level of the program) agreed that Kim's expulsion was "administrative," rather than "academic." Nelson Dep., at 113-14. Second, Nelson, not the promotions committee, made the initial decision to dismiss Kim. The appeal panel, according to Nelson, is only available for "academic" dismissals that are carried out by the promotions committee. *Id.*

"To be entitled to the procedural protections of the Fourteenth Amendment, [Kim must first] demonstrate that [his] dismissal from the school deprived (him) of either a 'liberty' or a 'property' interest." *Board of Curators of Univ. Of Missouri v. Horowitz*, 435 U.S. 78, 82, 98 S. Ct. 948, 951 (1978). The United States Supreme Court assumes that a liberty or property interest exists in school dismissal cases. *See, e.g., Horowitz*, 435 U.S. at 84-85, 98 S.

Ct. at 952. Therefore, Kim meets the initial hurdle for asserting a due process claim.

Next, Kim must produce evidence that UASOM failed to meet minimum due process standards when it dismissed him. In the "landmark" case of *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, *cert. denied*, 368 U.S. 930, 82 S. Ct. 368 (1961), the former Fifth Circuit[3] recognized that students facing expulsion from a tax-supported educational institution[ ] are entitled to the protections of the due process clause. *G[ ]oss v. Lopez*, 419 U.S. 565, 576, 95 S. Ct. 729, 737 (1975). Specifically, such students are entitled to notice and an opportunity to be heard. *Horowitz*, 435 U.S. at 85-86, 98 S. Ct. at 952-53. (citations omitted). However, clarified the court, the opportunity to be heard need only be in the form of an "informal give-and-take." *Id.*

The Fifth Circuit further clarified the due process standards, by noting that the *Dixon* requirements are limited to "disciplinary" expulsions. *Mahavongsanan v. Hall*, 529 F.2d 448, 449 (5th Cir. 1976).

> Misconduct and failure to attain a standard of scholarship cannot be equated. A hearing may be required to determine charges of misconduct, but a hearing may be useless or harmful in finding out the truth concerning scholarship. There is a clear dichotomy between a student's

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[3] The Eleventh Circuit has adopted as precedent all Fifth Circuit Court of Appeals cases decided prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

> due process rights in disciplinary dismissals and in academic dismissals.

Id. at 450.

In *Board of Curators of the University of Missouri v. Horowitz*, the United States Supreme [C]ourt ratified the Fifth Circuit's analysis by recognizing that there is a "significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for far less stringent procedural requirements in the case of an academic dismissal." 435 U.S. at 86, 98 S. Ct. at 953. Accordingly, concluded the Supreme Court, "a hearing is not required by the Due Process Clause of the Fourteenth Amendment." *Id.* at 86 n.3, 98 S. Ct. at 953 n.3. Due process merely requires that school officials engage in a "careful and deliberate" "decision-making process" before expelling a student for academic reasons. *Haberle v. University of Alabama in Birmingham*, 803 F.2d 1536, 1539 (11th Cir. 1986) (citing *Horowitz*, 435 U.S. at 85, 98 S. Ct. at 952).

Applying the "careful and deliberate" test, Kim's procedural due process claim cannot survive summary judgment. He has produced no evidence which would indicate that UASOM's decision to expel him was reached without care and deliberation. Although Nelson alone made the original dismissal decision, the promotions committee not only ratified her decision, but also agreed that Kim's dismissal was not academic and therefore he was not entitled to utilize the three person panel. Nelson Dep., at 113-14. UASOM then allowed Kim two opportunities to be heard. Kim first appealed to Dr. Nelson and

then to Dr. Fallon, the Dean of the medical school. Nelson Dep., at 115. Finally, all of the decision makers were aware of Kim's personal and medical school history. *See id.*

Thus, not only did UASOM meet the constitutionally mandated procedural due process requirements for academic dismissals, by making a careful and deliberate decision, but UASOM also met the due process requirements for disciplinary dismissals, by allowing Kim an opportunity to be heard. Indeed, UASOM exceeded the minimum requirements of due process by allowing Kim two opportunities to be heard. Whether or not UASOM followed [its] normal appeal procedures is irrelevant for purposes of procedural due process. "The fact that the procedures used were ad hoc does not violate the Horowitz standard; no formal hearing is required." *Haberle*, 803 F.2d at 1539.

Nonetheless, UASOM's failure to follow its standard appeal procedures is not wholly irrelevant. Failing to follow established dismissal procedures does subject the decision maker to a substantive due process challenge. Such challenges, however, only provide a "narrow avenue for judicial review." *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 227, 106 S. Ct. 507, 514 (1985).

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Haberle, 803 F.2d at 1539 (emphasis supplied) (citing *Ewing*, 474 U.S. 214, 106 S. Ct. 507).

This narrow avenue for judicial review was utilized in *University of Michigan v. Ewing*, where the defendant medical school dismissed the plaintiff, a second year medical student, after he experienced academic difficulties and failed to obtain an acceptable score on his national board examination. 474 U.S. 214, 106 S. Ct. 507. Because Ewing, like Kim, could only advance to his third year if he obtained a satisfactory score on the national board test, the University expelled him after he scored the lowest in the program's history. When the University refused to allow him to retake the examination, Ewing sued, contending, *inter alia*, that his due process rights were violated because the medical school denied him the procedure available to other students: namely, the opportunity to re-take the examination. The United States Supreme Court found that the University did not violate Ewing's substantive due process rights by refusing his request to re-take the examination. "[W]hen viewed against the backdrop of his entire career at the University . . . ," the Supreme [C]ourt found that Ewing's dismissal "rested on academic judgment that [was] not beyond the pale of reasoned academic decision-making." *Ewing*, 414 U.S. at 227-28, 106 S. Ct. at 514-15. Therefore, the university's departure from its normal procedure of allowing retakes was not fatal. See *id.* Further, noted that [C]ourt, there was no evidence that the facts of Ewing's case made him similarly situated to those students who had been allowed to re-take the national board examination. *Id.* at 228 n.14, 106 S. Ct. at 515 n.14. Consequently, Ewing's termination did not "substantially deviate from

accepted academic norms when compared with [the defendants'] treatment of other students." *Id.*

Given the circumstances in the case presently before the court, UASOM's decision, like the decision in *Ewing*, was not "beyond the pale of reasoned academic decision-making." *See id.* at 227-28, 106 S. Ct. at 514-15. Kim had five opportunities to take the national board exam (two more opportunities than other students), but he had failed to sit for a single exam. Kim was well aware that continued enrollment in the program was conditioned upon a passing examination score and that UASOM required its medial school students to obtain a passing score within three examinations. Kim did not take the examination within the required time frame. "Therefore, he is not entitled to continue to pursue the [degree]. There is nothing arbitrary about such a requirement." *Haberle*, 803 F.2d at 1541. While UASOM had been very understanding of Kim's personal crises in the past, it was under no obligation to further excuse him from the program requirements.

Moreover, like Ewing, Kim cannot produce evidence that there were other similarly situated students who were treated more favorably. Consequently, this court has no comparators against which to evaluate UASOM's decision. Without such comparators and given Kim's repeated failure to meet UASOM's requirements for continued enrollment, Kim cannot show that UASOM's decision was arbitrary or that the medical school failed to exercise "professional judgment." *See Haberle*, 803 F.2d at 1539. Thus summary judgment for the defendants will be granted on Kim's procedural and substantive due process claims.

VI. AMERICANS WITH DISABILITIES ACT ("ADA") CLAIMS

A. ADA Claims Asserted Against The Individual Defendants

Both Dr. Nelson and Dr. Fallon correctly assert that they are improper defendants inasmuch as Kim asserts ADA claims against them in their individual or official capacities. The ADA "does not provide for individual liability, only for employer liability." *Mason v. Stallings*. 82 F.3d 1007, 1009 (11th Cir. 1996). Therefore, the court will grant summary judgment to Nelson and Fallon on Kim's ADA claim.

B. ADA Claims Asserted Against UASOM

When the current motion for summary judgment came under submission, UASOM did not have the benefit of this court's January 13, 1998, opinion in *Garrett v. Board of Trustees of the Univ. of Alabama in Birmingham*, CV-97-AR-0092-S. Accordingly, UASOM did not raise an Eleventh Amendment Immunity defense in response to Kim's ADA claim. Consistent with the *Garrett* decision, the court holds that UASOM is immune from suit under the ADA and is therefore entitled to summary judgment on said claim.

Even if UASOM were not entitled to Eleventh Amendment immunity, Kim's ADA claim could not survive. To establish a prima facie case for disability discrimination Kim must show that: (1) he has a

disability;[4] (2) he is a qualified individual; and (3) he was subjected to unlawful discrimination because of his disability. *Holbrook v. City of Alpharetta,* 112 F.3d 1522, 1526 (11th Cir. 1997) (citations omitted). A qualified individual with a disability is one who can "perform the essential functions as a [UAB] medical student despite his disability or with a reasonable accommodation for his disability." *Ellis v. Morehouse School of Medicine,* 925 F. Supp. 1529, 1540 (N.D. Ga. 1996).

Kim is unable to make out a prima facie case for disability discrimination because he cannot show that he is a qualified individual with a disability. As discussed in this court's analysis of his race discrimination claim, Kim failed to meet the objective criteria for continued enrollment in the medical school, by failing to obtain a passing [s]core on the USMLE within the requisite number of examinations. Consequently, Kim is not qualified to remain in the program and therefore cannot make out a prima facie case for disability discrimination.

Second, Kim's prima facie case fails because he is unable to produce evidence that his dismissal was based upon his disability. Nelson's comments regarding Kim needing psychiatric help do not establish improper

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[4] The ADA defines a disability as: "a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; B) a record of such impairment; or C) being regarded as having such an impairment." 42 U.S.C. § 12101(2). Kim asserts that he is disabled for purposes of the ADA because UASOM regarded him as having an impairment. Although UASOM contends that Kim does not meet any ADA definition of disability, the court assumes that Kim is disabled for purposes of this motion for summary judgment.

motive. There is no evidence which might even remotely suggest that an improper motive entered into the ultimate decision made by Dean Fallon to affirm Kim's dismissal. Kim simply did not meet the program requirements.

Finally, even if Kim could make out a prima facie case of disability discrimination he still could not survive summary judgment. Although UASOM had a duty to provide reasonable accommodations that would have enabled Kim to meet the requirements of the program, the court determines, as a matter of law, that UASOM fulfilled this duty. "[T]he point is not whether a medical school is 'right' or 'wrong' in making program-related decisions." *Wynne v. Tufts Univ. School of Medicine*, No. Civ.A. 88-1105-Z, 1992 WL 46077 (D. Mass. 1992), *aff'd*, 976 F.2d 791, 795 (1st Cir. 1992), *cert. denied*, 507 U.S. 1030, 113 S. Ct. 1845 (1993). This court can only review the expulsion "to determine if [Kim] presents evidence that [UASOM's] decision to dismiss him was so arbitrary or irrational as to not constitute an exercise of professional judgment." *See Ellis*, 925 F. Supp. at 1543, 1541-[4]2 (applying the deferential due process standard in academic dismissal cases where the plaintiff alleges discrimination). "That [UASOM] could have provided a different set of reasonable accommodations or more accommodations does not establish that the accommodations provided were unreasonable or that the additional accommodations were necessary." *Wynne*, 1992 WL 46077, at *1.

There is nothing in the record to suggest that UASOM's dismissal of Kim was "so arbitrary or irrational as to not constitute an exercise of professional judgment."

See Ellis, 925 F. Supp. at 1543. UASOM more than reasonably accommodated Kim's disability for several years. It granted Kim a retroactive leave of absence, excused Kim's failure to sit for the two 1994 examinations and allowed him three more opportunities to take the USMLE. However, Kim exhausted his three additional opportunities without even sitting for the examination. UASOM was under no duty to further excuse him from the essential requirements of the program. *See id.* at 1547 (noting that the defendant "is only required to accommodate [the plaintiff] to the extent that such accommodation would not fundamentally alter the nature of its program") (citing *Southeastern Community College v. Davis*, 442 U.S. 397, 409, 99 S. Ct. 2361, 2368-69 (1979)). Therefore, like his other claims, his ADA claim also fails.

VII. Conclusion

Because no genuine issues of material fact are in dispute, the defendants are entitled to summary judgment on all claims asserted by Kim.

DONE this 12th day of March, 1998.

/s/ William M. Acker
WILLIAM M. ACKER, JR.
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-6248

ANDREW K. KIM,

Plaintiff-Appellant,

versus

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, for its division, The University of Alabama School of Medicine; HAROLD J. FALLON, M.D., et al.,

Defendants-Appellees.

On appeal from the United States District Court for the Northern District of Alabama

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(Filed May 28, 1999)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, ___ F.2d ___).

Before: TJOFLAT, ANDERSON and EDMONDSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Tjoflat
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
OCT 5 1999
OFFICE OF THE CLERK

No. 99-353

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

ANDREW K. KIM,

Petitioner,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, for its division, the University of Alabama School of Medicine, HAROLD J. FALLON, M.D., and KATHLEEN G. NELSON, M.D.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

This case raises the question of what process is due a student dismissed for non-academic reasons. The Eleventh Circuit applied a standard considerably lower than that which would have been applied to this case by the First, Sixth, and Eighth Circuits. Furthermore, the Eleventh Circuit ignored the standard set out in this Court's opinions, which require a higher level of procedural protections than given here where a dismissal is based on non-academic grounds.

Respondents try to deny the existence of a conflict by claiming that Kim was dismissed on "academic" grounds, and hence not entitled to any heightened process applied to disciplinary dismissals. This argument is contrary to the

findings of the district court and the admissions of Dr. Nelson.

First, the district court credited Dr. Nelson's testimony that Kim's dismissal was *not* academic in nature. Pet. App. B11. Indeed, the non-academic character of the dismissal was the sole basis given by the University for depriving Kim of its academic dismissal procedures as set out in the student handbook or as applied in practice. Pet. App. B13. For respondents to now claim that the dismissal was "academic" is more than a bit disingenuous.

Second, the Eleventh Circuit mistakenly imputed to the district court the view that this was a "hybrid case (involving aspects of both academic and disciplinary dismissal)." Pet. App. A4. Aside from misdescribing the district court's finding and the testimony from respondents, the Eleventh Circuit's view plainly recognizes at least *some* disciplinary aspect to the dismissal. Respondents' current claim in this Court that the dismissal was purely academic thus was not the basis of the Eleventh Circuit's decision and lacks support in either court below.

Third, Dr. Nelson has admitted that Kim was not dismissed for failure to pass the USMLE under the University's three-strikes rule. Nelson conceded that all but the final June 1996 failure to sit for the exam were excused, and that had he sat for and failed the exam he would not have been dismissed and could have sat for the exam again. R1-19, Nelson Dep., at 51-57, 63. Thus, under the University's academic requirements, Kim would have had only one strike had he failed in June 1996, demonstrating that he was dismissed for some other reason than the three-strikes policy. That reason was essentially a supposed failure to do as he was told – to sit for the exam – and thus his dismissal constitutes punishment for an alleged infraction rather than an academic failing.[1]

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[1] Respondents dispute the description of Dean Nelson's testimony that Kim would have been allowed two more strikes had he sat for and failed the June 1996 USMLE. BIO at 6. But they fail to quote a single sentence

Respondents recognize that "Kim had not failed any of his courses in the first two years of medical school," but nonetheless argue that he "simply failed to satisfy an academic prerequisite for advancement." BIO at 5.[2] But this argument misperceives the nature of the *deprivation* in this case. Kim is not complaining that he was not *advanced* to his third year. Rather, he is challenging his complete dismissal from the medical school, and the deprivation of his last two "strikes" under the University's three-strikes rule regarding the USMLE. While Kim's non-advancement may have been a rote application of an academic requirement that he pass the USMLE before advancing, his expulsion from school was punitive and not at all based on the academic requirements for advancement or the three-strikes rule.

Respondents make a misplaced attempt to distinguish *Gorman* v. *University of Rhode Island*, 837 F. 2d 7, 13-14 (CA1 1988), *Hall* v. *Medical College of Ohio at Toledo*, 742 F. 2d 299, 308 (CA6 1984), *cert. denied*, 469 U. S. 1113 (1985), and *Woodis* v. *Westark Community College*, 160 F. 3d 435, 440 (CA8 1998). That each of those cases involved expulsions for worse alleged behavior than occurred here only goes to show that the punishment in this case does not fit the crime, not that respondents' actions were not punitive. But those cases certainly are adequate for the purpose they were cited: to show the standard of due process in non-academic dismissal cases. In this case Kim was expelled for the sup-

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of testimony to the contrary. Respondents' bare citation to the Nelson Deposition is curious, given that the testimony therein fully supports Kim's position that his dismissal was not based on the academic three-strikes requirement. *See* R1-19, Nelson Dep., at 63 ("Q. Okay. If he had failed the June exam, would he then have been – in your opinion, would you have then allowed him to take it in September? A. In my opinion, yes. Q. If he had failed it in September, would you have allowed him to take it in June of '97 for the third shot at the USMLE Step 1 exam? A. Yes, probably.").

[2] Kim was actually a strong "B" student. He was never placed on academic probation, as is the usual case before an academic dismissal.

posed misconduct of not sitting for an exam, even though he believed he was merely burning one of his three strikes by doing so. He was not expelled for failure to *pass* the academic requirement, but rather was deprived – for disciplinary reasons – of his remaining two chances to meet the academic requirement.

Respondents' attempted defense of the due process analysis applied by the Eleventh Circuit, BIO at 7-8, is both incorrect and irrelevant. It is incorrect because it describes the process due for academic dismissals, not the higher process required for non-academic dismissals, and it is irrelevant because it does not deny that a different standard would have been applied to this case in three other Circuits. Respondents' discussion of the district court's conclusion that they also satisfied the higher test for disciplinary dismissals, BIO at 8, begs the question of whether the district court applied the proper scale to begin with. As noted in the Petition, what the opinions below mischaracterized as the higher standard for disciplinary dismissals was actually this Court's standard for academic dismissals, with the opinions mischaracterizing the supposed academic-dismissal standard in a manner well below what this Court requires in such cases.[3]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[3] Petitioner does not raise his substantive due process claim in this Court, and hence respondents' discussion of such claims is irrelevant to consideration of certiorari on the procedural due process issue.

Respectfully submitted,

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